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# Quests for Conception: Fertility Tourists, Globalization and Feminist Legal Theory

RICHARD F. STORROW\*

## INTRODUCTION

At the dawn of the twenty-first century, assisted reproduction continues to be a source of ambivalence. It is both celebrated as liberating couples and individuals from the pain of infertility and vilified as challenging appropriate methods of family formation.<sup>1</sup> Similarly, globalization, the process of creating a global economy by, among other things, dismantling international trade barriers and erecting efficient systems of communication,<sup>2</sup> has met with both celebration and scorn. For some, the figurative shrinking of the planet betokens increasing global wealth and enhanced opportunities for all.<sup>3</sup> Others react with uneasiness, fearing that globalization exacerbates global inequality.<sup>4</sup> This Article discusses the relationship between globalization and assisted reproduction by examining the fertility tourism that results from the enactment of restrictive reproductive laws. It specifically analyzes how

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1. See VALERIE HARTOUNI, CULTURAL CONCEPTIONS: ON REPRODUCTIVE TECHNOLOGIES AND THE REMAKING OF LIFE 113–14 (1997); Ken Plummer, *The Sexual Spectacle: Making a Public Culture of Sexual Problems*, in HANDBOOK OF SOCIAL PROBLEMS: A COMPARATIVE INTERNATIONAL PERSPECTIVE 521, 537 (George Ritzer ed., 2004) [hereinafter HANDBOOK].

2. See JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS ix (2003); ROGER BURBACH ET AL., GLOBALIZATION AND ITS DISCONTENTS: THE RISE OF POSTMODERN SOCIALISMS 13 (1997).

3. See generally PHILIPPE LEGRAIN, OPEN WORLD: THE TRUTH ABOUT GLOBALISATION (2004).

4. See STIGLITZ, *supra* note 2, at 153–55; BURBACH, *supra* note 2, at 13–14; Bernie D. Jones, *International and Transracial Adoptions: Toward a Global Critical Race Feminist Practice?*, 10 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 43, 48 (2004) (citing Barbara Stark, *Women and Globalization: The Failure and Postmodern Possibilities of International Law*, 33 VAND. J. TRANSNAT'L L. 503, 508, 510–12 (2000)).

the dynamics of such tourism raise issues of concern to feminist legal theorists.

The inspiration for a feminist look at the place of assisted reproduction in a globalizing world arises in part from the relative absence of feminist voices from the popular and academic literatures on globalization and bioethics. Globalization certainly has both its apologists and its critics, but the central dialogue about it focuses nearly exclusively on neo-liberalist policies and their deployment through ever widening systems of communication and supranational bodies of governance such as the World Trade Organization (WTO). The importance of national boundaries is said to fade under this influence; governments are reduced to implementing the neo-liberal policies established by international trade and banking organizations as prerequisites to participation in the world economy.<sup>5</sup> Critics decry the reduction of governments to the status of mere puppets of nongovernmental economic policymakers. Some have even branded the WTO itself "an embryo world government."<sup>6</sup>

Although those in power in the extra-legal, supranational bodies that set the course of globalization express disbelief that it creates or perpetuates inequality and discrimination,<sup>7</sup> concerns about economic inequality are audible in the debate over globalism. But specifically feminist and race-based concerns are more difficult to locate in the mainstream literature.<sup>8</sup> Even in the rare case where the potential for a feminist critique of globalism is acknowledged, it is sidestepped. For example, in his popular *The Lexus and the Olive Tree*, *New York Times* columnist Thomas L. Friedman posits that globalization is a phenomenon arising from three fundamental human motivations: (1) the struggle for sexual fulfillment and procreation; (2) the struggle for economic development and material fulfillment; and (3) the struggle for identity and legitimacy.<sup>9</sup> Of the three, Friedman elects to "leave matters

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5. See Stephen McBride, *The Politics of Globalization and Labour Strategies*, in GLOBALIZATION AND ITS DISCONTENTS 26 (Stephen McBride & John Wiseman eds., 2000) [hereinafter GLOBALIZATION AND ITS DISCONTENTS II]; LEGRAIN, *supra* note 3, at 7 ("Where governments choose to impede it, international traffic is stunted."); Videotape: *The New Rulers of the World* (Bullfrog Films 2001) [hereinafter *New Rulers*] (on file with the Pennsylvania State University Media & Technology Support Services) (statement of Stanley Fischer, then First Deputy Managing Director of the International Monetary Fund) ("Government policies dictate whether people can be lifted out of poverty, not debt cancellation by international lending agencies.").

6. *New Rulers*, *supra* note 5.

7. See *id.* (interview with economist Stanley Fischer, then First Deputy Managing Director of the International Monetary Fund). Fischer, who left the International Monetary Fund to become vice chairman of Citigroup, recently resigned that position and is now governor of the Bank of Israel. Steven Erlanger, *A Bright Diaspora Star Fails to Dazzle Israel*, N.Y. TIMES, Jan. 24, 2005, at A6.

8. See JAN JINDY PETTMAN, *WORLDING WOMEN: A FEMINIST INTERNATIONAL POLITICS* 157-58 (1996).

9. See THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 28-29 (1999).

of sex for somebody else”<sup>10</sup> and thereby minimizes a line of inquiry from which feminist voices are likely to emanate.<sup>11</sup> To his credit, Friedman at least acknowledges that globalization is simply a modern version of a very old story<sup>12</sup> and in this way distinguishes himself from those who uncritically celebrate globalization as unprecedented, fundamentally transformative and even mystical.<sup>13</sup> What makes globalization seem so new, of course, is that old and familiar concentrations of power have been subordinated or hidden within new and complex hierarchies; the role of the nation-state in world governance has diminished. Accounting for and understanding this new order may require us to retool our familiar methods of inquiry in order to bring to bear on globalization a non-linear, discipline-rich treatment of a sort not currently in fashion in an academy constructed of discrete, non-overlapping disciplines.<sup>14</sup>

Feminist scholars have experience with and have been successful at employing such a polyvalent method of inquiry to analyze a multiplicity of issues.<sup>15</sup> At the present time, feminists from a wide variety of disciplines who are particularly concerned about globalization are already calling for this kind of inquiry, seeking to expose how globalization reinforces social hierarchies that disadvantage women.<sup>16</sup>

Feminist voices have also been absent from scholarship on bioethics,

10. *Id.* at 29.

11. See Lisa Handwerker, *Health Commodification and the Body Politic: The Example of Female Infertility in Modern China*, in *EMBODYING BIOETHICS: RECENT FEMINIST ADVANCES* 141, 154 (Anne Donchin & Laura M. Purdy eds., 1999) [hereinafter *EMBODYING BIOETHICS*] (citing *FEMINISM & BIOETHICS: BEYOND REPRODUCTION* 4 (Susan M. Wolf ed., 1996)) (noting that sexuality and reproduction are realms of human experience in which women have a lot at stake).

12. See FRIEDMAN, *supra* note 9, at 28; see also BURBACH, *supra* note 2, at 108–09 (comparing today’s “symbolic analysts with the robber barons of the late nineteenth century”).

13. See Bob Pease & Keith Pringle, *Introduction: Studying Men’s Practices and Gender Relations in a Global Context*, in *A MAN’S WORLD? CHANGING MEN’S PRACTICES IN A GLOBALIZED WORLD* 9 (Bob Pease & Keith Pringle eds., 2001) [hereinafter *MAN’S WORLD*] (warning against academic “hype” of globalization as new and unprecedented); Nancy A. Wonders & Raymond Michalowski, *Bodies, Borders, and Sex Tourism in a Globalized World: A Tale of Two Cities—Amsterdam and Havana*, 48 *SOC. PROBS.* 545, 545 (2001) (citing JOSHUA KARLINER, *THE CORPORATE PLANET: ECOLOGY AND POLITICS IN THE AGE OF GLOBALIZATION* (1997); DAVID C. KORTEN, *WHEN CORPORATIONS RULED THE WORLD* (1995)); see also, e.g., LEGRAIN, *supra* note 3, at 107–15 (mystifying description).

14. See FRIEDMAN, *supra* note 9, at 24.

15. See Emory School of Law: Feminism and Legal Theory Project, at <http://www.law.emory.edu/flt/archive.php> (last visited Oct. 13, 2005) (archiving much of the Feminism and Legal Theory Project). The papers delivered at many of the workshops have been compiled and published. See, e.g., *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW & SOCIETY* (Martha A. Fineman & Terence Dougherty eds., 2005); *FEMINISM, MEDIA AND THE LAW* (Martha A. Fineman & Martha T. McCluskey eds., 1997); *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* (Martha A. Fineman & Isabel Karpin eds., 1995); *THE PUBLIC NATURE OF PRIVATE VIOLENCE* (Martha A. Fineman & Roxanne Mykitiuk eds., 1994); *AT THE BOUNDARIES OF THE LAW: FEMINISM AND LEGAL THEORY* (Martha A. Fineman & Nancy S. Thomadsen eds., 1991).

16. See, e.g., Richa Nagar et al., *Locating Globalization: Feminist (Re)readings of the Subjects and Spaces of Globalization*, 78 *ECON. GEOGRAPHY* 257, 273–74 (2002).

with the exception of reproductive technology, a branch of bioethics often marginalized as of peculiar interest to women<sup>17</sup> and in which scholarship has focused primarily on the objectification and exploitation of women's bodies by a masculinist medical establishment.<sup>18</sup> Feminist bioethicists are now calling for feminist analysis to expand across a broader swath of bioethical inquiry. What is required is "shifting the direction of bioethical theory and practice from its preoccupation with abstract undifferentiated individuals to the concrete particularities that shape the lives of embodied, socially situated humans."<sup>19</sup> By making this appeal, feminist bioethicists echo the sentiments of feminists who seek to reinvigorate global studies with interdisciplinary narrative accounts of gendered and racialized systems of oppression.<sup>20</sup>

This Article posits that the current phenomenon of European fertility tourism owes its existence to the interplay between member states' individual (some would say idiosyncratic) policies on "responsible" procreation and the globalist policy of free movement of persons within Europe thought to be essential to the continued integration and internationalization of European nations.<sup>21</sup> This premise gives rise to two important observations. First, globalization makes

17. See Anne Donchin & Laura M. Purdy, *Introduction*, in *EMBODYING BIOETHICS*, *supra* note 11, at 1, 2 ("Little in the realm of practical and academic bioethics is informed by feminist concerns."), 142, 154.

18. See, e.g., HELENA MICHIE & NAOMI R. CAHN, *CONFINEMENTS* (1997) (construction of infertility); CAROLYN MCLEOD, *SELF-TRUST AND REPRODUCTIVE AUTONOMY* 3 (2002); JANICE G. RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM* 70-75 (1993) (asserting that patriarchy concocts motherhood as the only valid fulfillment of a woman's destiny); Janet Gallagher, *Eggs, Embryos and Foetuses: Anxiety and the Law*, in *REPRODUCTIVE TECHNOLOGIES: GENDER, MOTHERHOOD AND MEDICINE* 139, 146 (Michelle Stanworth ed. 1987) [hereinafter *REPRODUCTIVE TECHNOLOGIES*] ("[W]hy [is] personhood [] equated universally with a capacity to reproduce[?]""); Ann Oakley, *From Walking Wombs to Test-Tube Babies*, in *REPRODUCTIVE TECHNOLOGIES*, *supra*, at 36, 36-79; Naomi Pfeffer, *Artificial Insemination, In-vitro Fertilization and the Stigma of Infertility*, in *REPRODUCTIVE TECHNOLOGIES*, *supra*, at 81, 81-84, 97; Carol Smart, "There is of course the distinction dictated by nature": *Law and the Problem of Paternity*, in *REPRODUCTIVE TECHNOLOGIES*, *supra*, at 98, 117.

19. Anne Donchin & Laura M. Purdy, *Introduction*, in *EMBODYING BIOETHICS*, *supra* note 11, at 6. See also *id.* at 8-9. Cf. Nagar et al., *supra* note 16, at 276-79 (articulating a paradigm); New Rulers, *supra* note 5 (describing an approach to exposing injustice under globalism).

20. Compare Anne Donchin, *Feminist Bioethics*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2004), available at <http://plato.stanford.edu/archives/fall2004/entries/feminist-bioethics/>, with Nagar et al., *supra* note 16, at 273.

21. See EUR. PARL. ASS. 8th Sess. 1648 (Jan. 30, 2004), available at <http://assembly.coe.int/Documents/AdoptedText/tao4/ERECr1648.htm>. Immigration to Europe may spawn anti-globalization reactions. See Theodore Cohn, *Globalization and Cross-Border People Movements: The Case of Recent Revisions in US Immigration Legislation*, in *GLOBALIZATION AND ITS DISCONTENTS II*, *supra* note 5, at 143, 143-44, 152-53 (noting anti-immigrant sentiment in industrial states to "globalization in the area of immigration"); cf. Siobhán Mullally, *Citizenship and Family Life in Ireland: Asking the Question "Who Belongs?"* (Feb. 19, 2005) available at [http://www.tjsl.edu/index.cfm?sID\\_int=59&rID\\_int=59&xID=188](http://www.tjsl.edu/index.cfm?sID_int=59&rID_int=59&xID=188) (commenting on a revision in Irish citizenship law "to stem the flow of inward migration to the State").

restrictive reproductive laws viable by facilitating the importation of proscribed reproductive choices across borders. Second, fertility travel raises concerns that feminists have exposed in the contexts of sex tourism and international adoption.

Part I of this Article defines and gives examples of fertility tourism and explains how fertility tourism is a symptom of globalization triggered by local restrictions on reproduction. Part II surveys feminist responses to reproductive technology and draws principles from this work as aids to a feminist evaluation of fertility tourism. The dearth of commentary on egg donation in the feminist literature is noted and explained. Parallels are drawn between feminist critiques of surrogacy and the situation of egg donors in an attempt to demystify the prevailing portraits of egg donors as either mercenary and emotionally barren or altruistic and deserving of glorification. In particular, this Part notes that the socioeconomic conditions that inspire feminist critiques of surrogacy are found also in the context of fertility travel for egg donation. Furthermore, the rigors of egg donation and the risks of superovulation justify rejecting the equation of egg donors with sperm donors. Part III describes a feminist framework for the study of globalization and shows how it has been or could be applied to various manifestations of globalization that have been of concern to feminists, namely, sex tourism and international adoption.

Part IV examines fertility tourism in light of the considerations articulated in the preceding three Parts. I first survey the extant scholarship on fertility tourism and note the absence of any treatment of the potential for third parties to be harmed or exploited at the site of treatment delivery. I then execute a comparison of fertility tourism, sex tourism and international adoption. I conclude that, on balance, fertility tourism raises many of the same concerns raised by sex tourism and, like sex tourism, appears unlikely to inspire the type of concerted response from governments and international bodies that has to a degree allayed humanitarian concerns arising in the context of international adoption. For this reason, countries considering bans or restrictions on certain forms of reproductive technology have an ethical obligation to consider and address the effects that those laws will have on infertile couples and gamete donors in countries that have become the destinations of fertility tourists.

## I. THE MEANING, CAUSES, AND FUNCTION OF FERTILITY TOURISM

The meanings of tourism are various. For most people, tourism conjures up images of traveling for pleasure,<sup>22</sup> but it can also mean the

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22. See Princeton University Cognitive Science Laboratory, WordNet [hereinafter WordNet], available at <http://www.cogsci.princeton.edu/cgi-bin/webwn>.

occupation of providing services for tourists.<sup>23</sup> Both of these definitions establish tourism as a type of traveling that involves leisure, pleasure and free time. Consequently, the tourist is someone who travels for pleasure.<sup>24</sup> A tourist, though, may also be one who travels for business or health reasons.<sup>25</sup> Likewise, a tour may be for pleasure or work or both. It may refer to a period of work or military duty<sup>26</sup> or more generally to a journey around an area,<sup>27</sup> often with an educational objective.<sup>28</sup>

Fertility tourism occurs when infertile individuals or couples travel abroad for the purposes of obtaining medical treatment for their infertility.<sup>29</sup> Fertility tourism may also occur in the reverse, when the infertile import the third parties necessary for their fertility treatment.<sup>30</sup> These definitions of fertility tourism are, on the one hand, difficult to harmonize with the idea of tourism as pleasure travel,<sup>31</sup> particularly given that some infertile individuals describe their condition as devastatingly painful and their effort to relieve it as requiring enormous physical and emotional exertion.<sup>32</sup> On the other hand, to use the term fertility tourism to refer to the network of services set up to provide infertility treatment to travelers from abroad is consistent with the second definition of tourism as an industry. It is particularly noteworthy that this industry markets fertility travel not only as family-affirming but also as an opportunity for romantic holidays. In addition to the photographs of happy couples cavorting on secluded beaches and relaxing in romantic restaurants that are the stock-in-trade of the tourism industry, advertisements for fertility treatment abroad carry images of newborn

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23. See reefED, *Glossary*, <http://www.reefed.edu.au/glossary/t.html>; WordNet, *supra* note 22; sitesALIVE! *Glossary*, <http://www.sitesalive.com/acctg/glossary.htm>.

24. See WordNet, *supra* note 22.

25. See U.S. Dep't of State, Bureau of Consular Affairs, Visitor Visas—Business and Pleasure, available at [http://travel.state.gov/visa/temp/types/types\\_1262.html#10a](http://travel.state.gov/visa/temp/types/types_1262.html#10a) (The State Department has a policy regarding the issuance of non-immigrant visas to those traveling to the United States for the purpose of obtaining medical treatment); U.S. Dep't of State, Bureau of Consular Affairs, Nonimmigrant Visas for Medical Treatment, available at [http://travel.state.gov/visa/laws/telegrams/telegrams\\_1533.html](http://travel.state.gov/visa/laws/telegrams/telegrams_1533.html).

26. See WordNet, *supra* note 22.

27. See *id.*

28. See EBENEZER C. BREWER, *THE DICTIONARY OF PHRASE AND FABLE*, <http://www.bootlegbooks.com/Reference/PhraseAndFable/data/1239.html> (noting that "The Grand Tour" of Europe was a way of "finishing" the education of young aristocrats).

29. See Guido Pennings, *Reproductive Tourism as Moral Pluralism in Motion*, 28 J. MED. ETHICS 337 (2002).

30. See Marcia C. Inhorn, *Religion and Reproductive Technologies: IVF and Gamete Donation in the Muslim World*, ANTHROPOLOGY NEWS, Feb. 2005, available at <http://www.aaanet.org/press/an/0502Inhorn.htm> (reporting recruitment of young American women for anonymous egg donation).

31. For a similar view, see *id.*

32. See *Nova: 18 Ways to Make a Baby* (PBS television broadcast, Oct. 9, 2001); Videotape: Adoption and Assisted Reproduction (Films for the Humanities 1989) (on file with the Pennsylvania State University Media & Technology Support Services).

babies being cuddled by loving parents.<sup>33</sup>

Describing the travelers themselves as fertility tourists squares nicely with the concept of tourists traveling for business purposes or in search of a cure. Moreover, understanding a tour as a quest involving physical displacement from the location of one's domicile aligns well with the fact that fertility tourists seek fertility and will go to great lengths to locate it. For these reasons, I will reserve the term fertility tourism in this Article to refer to the fertility tourism industry and will refer to travelers in search of infertility treatment as fertility travelers and fertility tourists. A fertility tour or fertility travel will refer to the act of traveling in search of treatment, receipt of treatment at the destination, and the return to the place of domicile.

Although traveling for the purpose of obtaining treatment for infertility has recently received worldwide media attention,<sup>34</sup> fertility travel is not a new phenomenon. Infertility is certainly a problem with a global dimension,<sup>35</sup> but international travel is certainly not the route most couples take to relieve their infertility. They may have no choice, however, where infertility treatment is unavailable to them in the location of their domicile. This may occur for various reasons. Services in a certain area may simply not exist because of a lack of demand or because certain therapies have not yet been introduced there.<sup>36</sup> They may be unavailable due to legal<sup>37</sup> or cultural<sup>38</sup> prohibitions, a factor that may even give rise to reverse fertility tourism.<sup>39</sup> Or they may be too costly for some individuals. Traveling along a continuum from available to unavailable, the therapies may actually be available and affordable to the prospective travelers but not in exactly the way they prefer, or they may require clearing numerous time-consuming administrative hurdles before

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33. See, e.g., *Affordable In Vitro Fertilization (IVF)*, <http://www.fertilityportal.com/ivf.htm> ("2.5 Weeks (18 days) vacation in the heart of the lovely European style South African coastal city of Cape Town"); Felicia R. Lee, *Driven by Costs, Fertility Clients Head Overseas*, N.Y. TIMES, Jan. 25, 2005, at A1 (reporting on Cape Town infertility clinic offering treatment and "a lovely holiday at the same time"); see also E. Blyth & A. Farrand, *Reproductive Tourism—A Price Worth Paying for Reproductive Autonomy?*, 25 CRITICAL SOC. POL'Y 91, 96 (2005).

34. See, e.g., Lee *supra* note 33, at A1.

35. See MARCIA C. INHORN, LOCAL BABIES, GLOBAL SCIENCE: GENDER, RELIGION, AND IN VITRO FERTILIZATION IN EGYPT 4 (2003) ("Infertility is a global health issue that affects millions of people worldwide."); Marcia C. Inhorn, *Global Infertility and the Globalization of New Reproductive Technologies: Illustrations from Egypt*, 56 SOC. SCI. & MED. 1837, 1838 (2003) (same); Abdallah S. Daar & Zara Merali, *Infertility and Social Suffering: The Case of ART in Developing Countries*, in CURRENT PRACTICES AND CONTROVERSIES IN ASSISTED REPRODUCTION (Effy Vayena et al. eds., 2002).

36. See Blyth & Farrand, *supra* note 33, at 97.

37. See Guido Pennings, *Legal Harmonization and Reproductive Tourism in Europe*, 19 HUM. REPROD. 2689 (2004) (arguing that ignoring pluralism in society will inevitably lead to reproductive tourism); Blyth & Farrand, *supra* note 33, at 96.

38. See Blyth & Farrand, *supra* note 33, at 97.

39. See Inhorn, *supra* note 30.



they can be accessed.<sup>40</sup> There may be a desire to benefit from more expert opinions or better success rates than are perceived to be readily available locally.<sup>41</sup> Finally, patients may simply desire the greater anonymity made possible through seeking medical treatment at some distance from their homes.<sup>42</sup>

The first well-publicized case of fertility tourism was the Rios case of the 1980s. In that case, Mario and Elsa Rios, a wealthy California couple, underwent in vitro fertilization using donor sperm at a fertility clinic in Australia.<sup>43</sup> Elsa did not become pregnant and left two embryos in storage.<sup>44</sup> The couple later adopted a child in Argentina, and in 1983, all three were killed in an airplane accident in Chile. Mr. Rios' son from a previous marriage claimed sole heirship. Questions eventually arose, though, about the status of the embryos. Were they persons or property? If persons, would they inherit the Rios' estate? These questions and others were considered by an Australian commission established to consider ethical issues arising from in vitro fertilization, the Victorian Parliament, and Australian and Californian right-to-life organizations. Ultimately, all that was established in the Rios matter was that the embryos probably were not viable;<sup>45</sup> the compelling questions raised by the matter remained unresolved.<sup>46</sup>

The face of reproductive tourism has changed since the Rios era. Today, treatment for infertility is widely available around the world.<sup>47</sup> Travel related to infertility occurs for reasons either of high cost,

40. See Mehmet R. Gazvani et al., *Payment or Altruism? The Motivation Behind Gamete Donation*, 12 HUM. REPROD. 1845, 1845 (1997) ("Recipient couples have to wait up to 3 years before treatment can be offered."); Guido Pennings, *Distributive Justice in the Allocation of Donor Oocytes*, 18 J. OF ASSISTED REPROD. & GENETICS 56, 56 (2001) (noting lengthening waiting lists for procuring a donor egg); Gill Higgins, *Egg Donation "Surges" in Romania*, BBC News, Dec. 23, 2004 (reporting that women in Britain may have to wait up to seven years for a donor egg), available at <http://news.bbc.co.uk/1/hi/health/4118625.stm>.

41. See MARY WARNOCK, *MAKING BABIES: IS THERE A RIGHT TO HAVE CHILDREN?* 11 (2002) (relating Northern Ireland tours to British mainland).

42. See, e.g., CHRISTINE JORGENSEN, *A PERSONAL AUTOBIOGRAPHY* (1967); *Witness: Offspring* (CBC television broadcast Oct. 10 2001) (describing the shame of artificial insemination resulting in travel to London for treatment).

43. See HARTOUNI, *supra* note 1, at 28.

44. See Gallagher, *supra* note 18, at 139.

45. See HARTOUNI, *supra* note 1, at 28.

46. See BONNIE STEINBOCK, *LIFE BEFORE BIRTH: THE MORAL AND LEGAL STATUS OF EMBRYOS AND FETUSES* 212 (1992).

47. See INHORN, *LOCAL BABIES*, *supra* note 35, at 1 (remarking on the opening of in vitro fertilization centers throughout the Muslim Middle East); Marcia C. Inhorn & Frank Van Balen, *Interpreting Infertility: A View from the Social Sciences*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON GENDER, CHILDLESSNESS, AND REPRODUCTIVE TECHNOLOGY* 3, 11, 16 (Marcia C. Inhorn & Frank Van Balen eds., 2001) (noting the spread of reproductive technology to impoverished countries). Although it exists in developing countries, infertility treatment is probably genuinely available only to a small cadre of elites. See HANDBOOK, *supra* note 1, at 310, 312 ("[T]he system is designed to meet the needs of a very small sociopolitical cadre rather than the general population.").

administrative obstacles,<sup>48</sup> or exclusionary reproductive policies. Great Britain and other Western countries, for example, have higher prices for reproductive services, pricing those with fewer resources out of the market and forcing them abroad.<sup>49</sup> The form of fertility travel commanding the most media attention recently, however, involves persons who seek infertility treatment that is outlawed in their own country. Infertile citizens of countries like Italy, Sweden, and Canada face restrictions not so much in the form of high costs, but on their choice to pursue particular types of infertility treatment. Like high costs, these restrictions on reproductive options trigger their travel to jurisdictions with less restrictive reproductive laws.<sup>50</sup>

An example of this contemporary form of fertility travel is the case of Diane Blood. Blood and her husband Stephen had begun planning to have children when he suddenly contracted meningitis and died.<sup>51</sup> At Blood's request, medical personnel extracted Stephen's sperm and stored it.<sup>52</sup> But Great Britain's Human Fertilisation and Embryology Authority later denied Blood's request for insemination, and she sued.<sup>53</sup> The court upheld the decision of the Authority given the absence of Stephen's written consent to the posthumous use of his sperm.<sup>54</sup> The issue then became whether Blood had the right to export the sperm and travel to another country that did not have similar prohibitions on posthumous conception.<sup>55</sup> The court decided that Blood did have such a right under European law.<sup>56</sup> Blood ultimately gave birth to two sons and then waged a successful battle to change the law so that her late husband's name could appear on his sons' birth certificates.<sup>57</sup>

Although reproductive technology today is available globally, it continues to be regulated on a piecemeal basis, with technological

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48. See Blyth & Farrand, *supra* note 33, at 99.

49. See Lee, *supra* note 33, at A1 (reporting on American couples who travel around the world in search of low-cost in vitro fertilization).

50. See June Carbone, *Toward a More Communitarian Future? Fukuyama as the Fundamentalist Secular Humanist*, 101 MICH. L. REV. 1906, 1922 (2003) (giving as an example of fertility tourism Swedes who "travel to Denmark for artificial insemination with donor sperm in order to circumvent a Swedish law that requires identification of the donors"); Angus Roxburgh, *Dutch Sperm Laws Threaten Donations*, BBC NEWS ONLINE, Aug. 12, 2004 (reporting changes in Dutch sperm donation law triggering fertility travel to Belgium), available at <http://news.bbc.co.uk/1/hi/world/europe/3555202.stm>.

51. See *R. v. Human Fertilisation & Embryology Auth.*, (1997) 2 Fam. 401 (Ct. App.).

52. See *id.*

53. See *id.*

54. See *id.*

55. See *id.*

56. See *Widow Allowed Dead Husband's Baby*, BBC NEWS, Feb. 6, 1997, available at [http://news.bbc.co.uk/onthisday/hi/dates/stories/February/6/newsid\\_2536000/2536119.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/February/6/newsid_2536000/2536119.stm).

57. See *Diane Blood Registers Sons*, BBC NEWS, Dec. 1, 2003, available at <http://news.bbc.co.uk/1/hi/england/nottinghamshire/3252436.stm>.

advances far outpacing the ability of the law to respond.<sup>58</sup> As such, much of the conduct of the private reproductive technology industry remains unregulated or is policed by medical societies that refuse to endorse fertility clinics not adhering to widely accepted practice guidelines. This is the case in the United States, where the American Society for Reproductive Medicine and the Society for Assisted Reproductive Technology fulfill such a role,<sup>59</sup> and the federal government's involvement is limited to the collection of data by the Centers for Disease Control and Prevention.<sup>60</sup> Individual states may regulate the conduct of fertility clinics through, for example, statutes prohibiting discrimination in public accommodations, but there is no uniformity of regulation at the state level.<sup>61</sup> Great Britain and Canada, in keeping with their intricate systems of socialized medicine, have enacted comprehensive legislation controlling many aspects of assisted reproduction. Under each country's model, a governmental agency issues licenses to clinics wishing to offer assisted reproductive services and oversees their work.<sup>62</sup> This model of centralization is uncommon throughout the rest of the world, where, by and large, regulation is sparse and far from uniform. Such a model may well be infeasible in a country like the United States, where there is a general dislike for and distrust of federal regulation of private matters.<sup>63</sup>

At times, proposals to regulate assisted reproduction arise in reaction to the perception that its use creates ethical or social problems that need to be addressed. Such regulation sometimes takes the form of single-issue lawmaking aimed at putting a stop to certain practices that either create a moral outcry or generate ethical confusion. For example, when sixty-six-year-old Adriana Iliescu recently gave birth after undergoing nine years of infertility treatment, legislation was immediately introduced in the Romanian Parliament to prohibit the delivery of infertility treatment to post-menopausal women. Supporters of the bill say it promotes child welfare by ensuring that those who receive infertility treatment will be able to care for any resulting child through adulthood.<sup>64</sup> Years earlier, France had outlawed postmenopausal

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58. See ISLAT Working Group, *ART into Science: Regulation of Fertility Techniques*, 281 SCIENCE 651, 651 (1998).

59. See *id.*; David Adamson, *Regulation of Assisted Reproductive Technologies in the United States*, in REPRODUCTIVE TECHNOLOGIES: A READER 1, 7-11 (Thomas A. Shannon ed., 2004).

60. See Adamson, *supra* note 59, at 2-4.

61. See Debora Spar, *Reproductive Tourism and the Regulatory Map*, 352 NEW ENG. J. MED. 531, 532 (2005) (noting the "patchwork of competing and conflicting regulations").

62. See *id.* at 533.

63. See *id.*

64. See *Mother, 66, And Baby Doing Well*, N.Y. TIMES, Jan. 18, 2005, at A8 (reporting that a post-menopausal woman's giving birth after years of fertility treatment gave rise to proposed legislation to ban infertility treatment for women above the normal reproductive age).

conception in reaction to reports that a sixty-two-year-old grandmother had given birth in Italy.<sup>65</sup> Based on these accounts, it is not difficult to understand why reproductive technologies that enliven debates about when life begins and who should be allowed to become a parent inspire lawmaking whose purpose is to import beliefs about religion or morality into the civil law. Reproductive technology provokes anxiety about these issues. As a result, proposed legislation often takes the form of proscribing practices that some fear reflect the moral degradation of society.

Not all reproductive laws, however, are generated by moral certainty on the part of the supporters. Great Britain, for example, expressed uncertainty about surrogacy when it was designing its Human Fertilisation and Embryology Act. It decided to curtail the practice not because of any strong consensus about the ethical questionability of surrogacy but because, all things considered, it was unnecessary to permit surrogacy in Britain given the availability of surrogates for hire in other parts of the world.<sup>66</sup> The view in Britain seems to have been that since surrogacy would occur no matter what policy the government adopted, the practice might as well be banned and fertility tourism permitted to ensue.<sup>67</sup> A similar conviction could have motivated France's ban on infertility treatment for postmenopausal women, given that it had been widely publicized that these women could receive treatment in the United States or Italy.<sup>68</sup> Given the ready supply of anonymously donated gametes in Denmark and the United States, Britain and Canada may well have had similar views when they each recently decided to outlaw anonymous gamete donation and compensation for gamete donors.<sup>69</sup> It is in precisely this way that fertility tourism acts as a moral safety valve permitting national parliaments to express local sentiments while simultaneously acknowledging the moral autonomy of those who do not agree with those sentiments.<sup>70</sup> Very little outcry over these restrictions

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65. See WARNOCK, *supra* note 41, at 47–48.

66. See *id.* at 87, 93 (describing the sentiment against surrogacy in Great Britain as in part due to the fact that British citizens could “cross the Atlantic” for surrogacy instead of allowing such a morally dubious arrangement to occur in Great Britain).

67. See *id.* at 90.

68. See *id.* at 47–48, 49.

69. See Karen Auge, *Canadians Head to Colo. for Fertility Help*, DENVER POST, Feb 3, 2005, at B8 (describing Canadian fertility tourism). Reacting to the ramifications of its new restrictions, Britain has launched a plea for egg and sperm donation. To get around the new in-country restrictions, some clinics in Britain offer anonymous international gamete donation programs if couples are willing to travel overseas. The London Bridge Fertility, Gynaecology and Genetics Centre, *International Egg Donation Programme*, at [http://www.bridge-eggrecipient.com/international\\_donation\\_programme.htm](http://www.bridge-eggrecipient.com/international_donation_programme.htm) (last visited Oct. 10, 2005) (describing London Bridge Centre's International Egg Recipient Program).

70. See Guido Pennings, *Legal Harmonization*, *supra* note 37 (commenting that “[r]eproductive tourism is a safety valve that reduces moral conflict and expresses minimal recognition of the others' moral autonomy” and recommending against top-down legislation (“harmonization”) because “these

occurred since they were not particularly broad in scope, did not create an outright ban on any particular procedures, and it was relatively easy to travel from those countries with restrictive policies to places where the desired services could be obtained.

Of most relevance to the current discussion is the highly restrictive legal regime enacted recently in Italy. After many years of developing a reputation for offering services on the cutting edge of reproductive science,<sup>71</sup> Italy has experienced a legislative retrenchment of its formerly liberal treatment practices. Under the Medically Assisted Reproduction Law, infertility services have been sweepingly curtailed. The new law bans sperm and egg donation, embryo freezing, and surrogate motherhood and severely limits the number and type of fertility services available to "stable" heterosexual couples.<sup>72</sup> Rumored to have been motivated by religious forces,<sup>73</sup> or possibly those bent on reinscribing the nuclear family as the only proper locus for procreation or investing embryos with personhood,<sup>74</sup> the legislation is noticeably driven by the systematic exclusion of third-party involvement in the reproductive process and also a certain view of the moral status of the embryo. On a more attenuated level, it might also be influenced by Roman Catholic

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private ethical matters" should be addressed by national parliaments).

71. See Dominic Standish, *A Law Too Far*, SPIKED-SCIENCE, Sept. 3, 2004, <http://www.spiked-online.co.uk/Printable/0000000cA6Co.htm>.

72. See Sophie Arie, *Fertility's Closed Italian Frontier*, CHRISTIAN SCIENCE MONITOR, Mar. 10, 2004, at 1.

73. See John A. Robertson, *Protecting Embryos and Burdening Women: Assisted Reproduction in Italy*, 19 HUM. REPROD. 1693, 1694 (2004) ("One explanation no doubt is the strong opposition of the Vatican to gamete donation because of the fear that third party provision of oocyte or sperm will weaken family bonds and confuse the heritage of children."). What is clear, though, is that Roman Catholic doctrine is not the sole template for the policy. That doctrine, which condemns procreation not arising from intercourse in marriage, would proscribe even AIH. See PAUL LAURITZEN, PURSUING PARENTHOOD: ETHICAL ISSUES IN ASSISTED REPRODUCTION 6 (1993); Martin L. Cook, *Reproductive Technologies and the Vatican*, ISSUES IN ETHICS, Spring 1988, <http://www.scu.edu/ethics/publications/iie/v1n3/homepage.html>. There is disagreement within the church as to whether the techniques of gamete intrafallopian transfer and tubal ovum transfer are consistent with church doctrine. See Richard C. Sparks, *Helping Childless Couples Conceive*, ST. ANTHONY MESSENGER, Apr. 1997, <http://www.americancatholic.org/Messenger/Apr1997/feature1.asp> ("[T]he Catholic Church has made no definitive or official universal pronouncement about these two procedures.").

74. See Smart, *supra* note 18, at 117 (biological, nuclear family); Lesley Doyal, *Infertility—a Life Sentence? Women and the National Health Service*, in REPRODUCTIVE TECHNOLOGIES, *supra* note 18, at 174, 174 (embryonic rights); Gallagher, *supra* note 18, at 147 ("[T]he insistence that all fertilized eggs must be implanted—at whatever physical or psychic cost to the women involved—echo the claims of 'foetal rights' now being asserted by some conservative American doctors and legal commentators."); Hilary Rose, *Victorian Values in the Test-tube: The Politics of Reproductive Science and Technology in Reproductive Technologies*, *supra* note 18, at 172 ("[T]he successful 'Brennan Story' requires a heterosexual partner whose participation supports the legitimacy of the therapeutic intervention."); see also Doyal, *supra* note 74, at 176 ("reinforcing a particular model of femininity and a nuclear family life-style"). For a catalog of arguments supporting the importance of keeping genetic and social parenthood together, see LAURITZEN, *supra* note 73, at xix.

proscriptions on male masturbation.<sup>75</sup> The law not only proscribes services but also penalizes physicians who publicize locations abroad where egg donation is available.<sup>76</sup> In addition to raising concerns that the law will adversely impact women's rights in Italy<sup>77</sup> and that it is suspiciously out of step with Italy's otherwise pronatalist policies,<sup>78</sup> it has led to a drop in the success rate of Italian infertility treatment and has generated growth in the fertility tourism industry in Eastern Europe and elsewhere around the world.<sup>79</sup>

In response, clinics in countries like Russia and Slovenia employ the Internet to attract fertility tourists with promises of cut-rate in vitro fertilization, high success rates, liberal reproductive policies and little administrative oversight.<sup>80</sup> Seen against this backdrop, fertility tourism's function as a "safety valve" against direct, local resistance to restrictive laws that circumscribe women's reproductive choices is readily discernible. The Italian government appears to recognize and accept that fertility tourism is essential to the longevity of its reproductive policy. Indeed, in its apparent desire to encourage such tourism, the government has decided that it will recognize the parentage of Italian couples who employ third-party gamete donation abroad that results in the birth of

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75. See WARNOCK, *supra* note 41, at 30.

76. See Robertson, *supra* note 73, at 1695.

77. See *id.* at 1693. Canada's recently enacted Assisted Human Reproduction Act specifically recognizes that women are directly and significantly affected more than are men by restrictive reproductive laws. See ASSISTED HUMAN REPRODUCTION ACT § 2(c) (2004) ("while all persons are affected by these technologies, women more than men are directly and significantly affected by their application and the health and well-being of women must be protected in the application of these technologies"), available at <http://laws.justice.gc.ca/en/a-13.4/text.html>.

78. Pronatalism is the ideological emphasis on the desirability of having children. See MARCIA C. INHORN, INFERTILITY AND PATRIARCHY: THE CULTURAL POLITICS OF GENDER AND FAMILY LIFE IN EGYPT 50, 230 (1996). Italy exhibits a certain pronatalism by seeking to prop up its declining birth rate by offering cash incentives to encourage childbirth. See Arie, *supra* note 72, at 1 (reporting the offering of cash incentives "for every naturally born second child"). Italy and Spain have the lowest birth rates in Europe. Jason Horowitz, *Italian Debate on Fertility Bill Raises Issue of Church Influence*, N.Y. TIMES, Dec. 14, 2003, at A36. On declining global fertility rates generally, see Felix M. Berardo & Constance L. Shehan, *Family Problems in Global Perspective*, in HANDBOOK, *supra* note 1, at 246, 249. On the relationship between declining fertility and pronatalism, see INHORN, LOCAL BABIES, *supra* note 35, at 7 ("Because children are greatly desired in high-fertility, pronatalist societies, women do not regularly abort, thereby exposing themselves to the risk of sterilizing infections from STDs, unsafe abortions, and postpartum infections following pregnancy.").

79. Standish, *supra* note 71.

80. See IVF: Why in Russia?, <http://www.ivf-russia.com/why.htm> (last visited Oct. 21, 2005) (marketing Russian in vitro fertilization as cost-effective, more successful than in the West, unhindered by restrictive legislation—banning only human cloning and nuclear transfer—and performed by doctors who have received some training in the West); *Center za Oploditev z Biomedicinsko Pomocjo*, <http://www.neplodnost.com> (last visited Oct. 12, 2005) (marketing in vitro fertilization, laser-assisted ICSI and laser-assisted embryo hatching). On embryo hatching, see Hamilton Thorne Biosciences, *Hamilton Thorne Biosciences Announces FDA Marketing Clearance of Its ZILOS-ik Zona Laser Drill for Assisted Hatching of Embryos*, Nov. 9, 2004, [http://www.ivf.net/artman/publish/article\\_596.php](http://www.ivf.net/artman/publish/article_596.php).

children in Italy.<sup>81</sup> In this context, then, policymaking that appears to signal a departure from globalist trends in favor of local values,<sup>82</sup> actually depends upon tourism—a manifestation of globalization<sup>83</sup>—for its viability against organized resistance. Thus, globalization undergirds the continued effectiveness of laws that, in Italy at least, dismantle women's rights at the local level.

## II. FEMINISM AND ASSISTED REPRODUCTION

There is no unified feminist response to reproductive technology.<sup>84</sup> Although the reality is perhaps much more complex, there is at the very least a visible breakdown in agreement on reproductive technologies between what some have termed radical or matrifocal<sup>85</sup> feminism and liberal feminism.

Radical feminists make several key observations on the effect of reproductive technology on women's lives. First, they view the pressure not to be childless as arising from a patriarchal construction of "childlessness as a disease."<sup>86</sup> This construction becomes the basis upon which the condition of infertility becomes understood in the popular imagination as a failure of the body that inevitably leads to emotional desperation.<sup>87</sup> Furthermore, despite the high incidence of male infertility worldwide,<sup>88</sup> the condition is invariably cast as a female problem<sup>89</sup> that requires medical intervention.<sup>90</sup> Institutional ignorance about the environmental causes of infertility and a myopic focus on women's reproductive capacity to the detriment of other health issues of concern to women become entrenched.<sup>91</sup> Consequently, to satisfy the masculine

81. See Robertson, *supra* note 73, at 1695.

82. Cf. Mullally, *supra* note 21 (commenting on anti-abortion policies as "markers of Ireland's distinct cultural identity").

83. See Blyth & Farrand, *supra* note 33, at 93, 96.

84. Gallagher, *supra* note 18, at 145; LAURITZEN, *supra* note 73, at 139 n.22; MICHIE & CAHN, *supra* note 18, at 6 (noting the deep and often bitter division among feminists).

85. MICHIE & CAHN, *supra* note 18, at 7.

86. RAYMOND, *supra* note 18, at 153.

87. See Inhorn & Van Balen, *supra* note 47, at 21.

88. See INHORN, LOCAL BABIES, *supra* note 35, at 6 ("Male infertility is either the sole cause or a contributing factor in more than half of all cases of infertility worldwide . . .").

89. See INHORN, INFERTILITY & PATRIARCHY, *supra* note 78, at 24; RAYMOND, *supra* note 18, at 1-2; Arthur L. Greil, *Infertile Bodies: Medicalization, Metaphor, and Agency*, in INFERTILITY AROUND THE GLOBE, *supra* note 47, at 101; Inhorn & Van Balen, *supra* note 47, at 19; see also MICHIE & CAHN, *supra* note 18, at 4 (in a book analyzing fertility advice literature, noting that the reader is always "textually marked as female, even if the problem is one of 'male infertility'").

90. See Rose, *supra* note 74, at 172.

91. See Inhorn & Van Balen, *supra* note 47, at 14; Federico Neresini & Franca Bimbi, *The Lack and the "Need" of Regulation for Assisted Fertilization: The Italian Case*, in BODIES OF TECHNOLOGY: WOMEN'S INVOLVEMENT WITH REPRODUCTIVE MEDICINE 207, 210 (Ann Rudinow Saetnan et al. eds., 2000); Rose, *supra* note 74, at 172; Marcia C. Inhorn & K. Lisa Whittle, *Feminism Meets the "New" Epidemiologies: Toward an Appraisal of Antifeminist Biases in Epidemiological Research on Women's Health*, 53 SOC. SCI. & MED. 553, 559, 560, 561 (2001).

insistence on having a biological connection to offspring, the bodies both of infertile women and of those who are paired with infertile men become subject to a host of medical interventions,<sup>92</sup> including not only invasive in vitro fertilization but also experimentation that is of little benefit to them.<sup>93</sup> Radical feminists find it ironic that men typically dominate reproductive decisions<sup>94</sup> despite the fact that “women want fewer children than do their male partners, and . . . want to exercise more control over their fertility.”<sup>95</sup> The general hostility radical feminists bear toward reproductive technology arises from the view “that women’s choice to participate in infertility treatments is so conditioned by the socially constructed stigma of infertility and a societally imposed norm of maternity as to be no real ‘choice’ at all.”<sup>96</sup> When examined alongside the fertility industry, a multi-billion dollar industry headed by men,<sup>97</sup> the combination of these dynamics begins to look like the enlistment of women’s gestational power for patriarchal ends,<sup>98</sup> part of a general system that perpetuates the objectification and commodification of women.<sup>99</sup>

In contrast to radical feminists, liberal feminists emphasize choice, autonomy, and informed consent.<sup>100</sup> Through this lens, assisted reproductive arrangements such as surrogacy tend to appear unproblematic, at least if measures are taken to ensure full and fair disclosure and to safeguard against overreaching.<sup>101</sup> Moreover, the recognition of intentional parenthood by assisted reproduction jurisprudence and specialized legislation may serve as an antidote to laws that marginalize nontraditional families.<sup>102</sup> Professor Marjorie Maguire

92. See LAURITZEN, *supra* note 73, at 137 n.9 (on feminist objections to using in vitro fertilization to treat male-factor infertility).

93. See *id.* at 29.

94. See Berardo & Shehan, *supra* note 78, at 249, 250.

95. See *id.* at 250.

96. Gallagher, *supra* note 18, at 146 (citations omitted).

97. See LORI B. ANDREWS, *THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY* 220 (1999).

98. See JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 14 (1994) (“treat the woman as a reproductive vessel to produce or serve the interests of males and the state in healthy offspring”); Juliette Zipper & Selma Sevenhuijsen, *Surrogacy: Feminist Notions of Motherhood Reconsidered*, in *REPRODUCTIVE TECHNOLOGIES*, *supra* note 18, at 120, 126 (e.g., “Maria Mies call[s] reproductive technology a new stage in the patriarchal war against women.”). For a more tempered view, see Rose, *supra* note 74, at 171.

99. LAURITZEN, *supra* note 73, at 14, 30.

100. See Karen H. Rothenberg, *Feminism, Law, and Bioethics*, 6 KENNEDY INST. ETHICS J. 69, 70, 75 (1996).

101. See *id.* at 75.

102. See, e.g., Marjorie Maguire Shultz, *Reproductive Technology and Intent-based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 322–27 (1990); John Lawrence Hill, *What Does It Mean To Be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 414–15 (1991).



Shultz, a champion of this view, focuses on the enhanced role intention has assumed in procreative decision-making.<sup>103</sup> Given the importance of intention in assisted conception, Shultz believes that contracts will become significant devices in carrying out procreative arrangements.<sup>104</sup> She defines intention as the direct, specific, purposeful and unambiguous link between voluntary behavior and outcome in the context of a set of alternatives from which to choose<sup>105</sup> and proposes that the law of assisted conception, particularly as it relates to parentage determinations, strive to recognize "the legitimacy of individual efforts to project intentions . . . into the future."<sup>106</sup> To best achieve this goal, Shultz proposes to make "bargained-for intentions determinative of legal parenthood"<sup>107</sup> when assisted reproduction is used<sup>108</sup> and to police these intentions through contract law's special protections against choices procured through overreaching or contrary to reasoned public policy.<sup>109</sup> She sees the opportunity for the creation of nontraditional families increasing by these means "[b]ecause procreation and sexual-interpersonal intimacy are no longer tied together . . . ."<sup>110</sup> She also notes the gender neutrality of intention as a way for courts to determine parentage outside the constraints of gender stereotypes and biases.<sup>111</sup>

Despite the level of disagreement among feminists about the value of reproductive technology, one unifying concern revolves around how decisions about who is a suitable case for infertility treatment are made.<sup>112</sup> This is unsurprising, given that a law of medical technology that channels people in the direction of "responsible" procreation is a particularly potent premise for unequal treatment on a variety of levels. Single mothers, gays and lesbians, and the poor all suffer exclusion from reproductive technology under initiatives that categorize married heterosexual couples as more deserving than others to benefit from reproductive technology<sup>113</sup> or style exclusionary policies as in the best

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103. *See id.* at 300.

104. *See id.* at 325.

105. *See* Shultz, *supra* note 102, at 307, 309-10 ("The purpose of those who invoke new reproductive procedures is clear, specifically targetted and unambiguous.").

106. *Id.* at 302.

107. *Id.* at 323.

108. *See id.* at 324.

109. *See id.* at 346-69.

110. *Id.* at 315; *see also id.* at 344 ("If society were to recognize intention as a basis for claiming parenthood in circumstances of artificial reproductive techniques, intention-based variations in family form would likely be better tolerated and less problematic.").

111. *See id.* at 378-95 (discussing outcome of *Baby M.* case as a "missed opportunity for gender-neutral access to children").

112. *See* Rose, *supra* note 74, at 172 ("Now it is precisely this agreement (between obstetrician and ethicist)—that doctors naturally are the right profession to decide who is a suitable case for infertility treatment or gene therapy—that must be a major source of political and particularly feminist concern.").

113. *See* Margarete Sandelowski & Sheryl de Lacey, *The Uses of a "Disease": Infertility as*

interests of the not yet conceived.<sup>114</sup> Thus, aside from whether the medical establishment conspires to oppress women through reproductive technology, tying a woman's reproductive choices to whether she is or is not coupled with a man is a matter of general feminist preoccupation and concern. Such a concern would seem to transcend the labels "radical" and "liberal" and to be consistent with a "gendered institutions perspective" toward understanding the power of gender in social life.<sup>115</sup>

Another element common to radical and liberal feminist readings of reproductive technology is the absence of a developed theory of egg donation, which figures prominently in reproductive tourism. Ruth Colker has written on reproductive technology, but her signature trope—pregnant men—emphasizes gestation and does not engage egg donation per se.<sup>116</sup> Janice Raymond has written on the "international traffic in reproduction," but her comments are limited to speculation about how reproductive technology inspires the rich in the north to prey on the women of the impoverished south for gestational services.<sup>117</sup> The Feminist International Network of Resistance to Reproductive and Genetic Engineering has speculated that the way in which commercial surrogacy has reduced women to the value of their reproductive parts "is the danger that attends the establishment of egg donor programs."<sup>118</sup> Just as in surrogacy, the argument goes, "socioeconomic conditions [may] pressure women into 'choosing' these arrangement[s]."<sup>119</sup> Indeed, it is possible to insert "egg donation" for "surrogate motherhood" in many of these critiques, as "the core reality of [egg donation] is that it is both classist and sexist: a method to obtain children genetically related to white males by exploiting poor women."<sup>120</sup> Further crystallizing the conflation of egg donors and surrogates, Gena Corea has lumped the two groups together as "reproductive prostitutes."<sup>121</sup>

It is understandable that gestation for hire has become a flashpoint igniting debates between radical and liberal feminists, but the debates

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*Rhetorical Vehicle*, in INFERTILITY AROUND THE GLOBE, *supra* note 47, at 33, 36.

114. See Andrea D. Gurmankin et al., *Screening Practices and Beliefs of Assisted Reproductive Technology Programs*, 83 FERTILITY & STERILITY 61, 63 (2005).

115. Amy S. Wharton, *Gender Inequality*, in HANDBOOK, *supra* note 1, at 156, 157, 168.

116. See RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY & THE LAW 137–53 (1994); Ruth Colker, *Pregnant Men Revisited or Sperm Is Cheap, Eggs Are Not*, 47 HASTINGS L.J. 1063, 1072 (1996) (discussing Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992)).

117. See RAYMOND, *supra* note 18, at 138–54; see also COLKER, PREGNANT MEN, *supra* note 116, at 139 (discussing baby factories in third-world countries).

118. LAURITZEN, *supra* note 73, at 14.

119. Laura R. Woliver, *Reproductive Technologies, Surrogacy Arrangements, and the Politics of Motherhood*, in MOTHERS IN LAW, *supra* note 15, at 350.

120. *Id.*; see ROBERTSON, *supra* note 98, at 14 ("reproductive benefits secured through the bodies of women who often have few other real options").

121. GENA COREA, MAN-MADE WOMEN: HOW NEW REPRODUCTIVE TECHNOLOGIES AFFECT WOMEN 39 (1987).

have delayed the development of a very detailed feminist theory of third-party egg donation. This may have to do in part with the invisibility of egg donors themselves. Nothing in assisted reproduction case law, for example, challenges the portrayal of third-party egg donors as anonymous women making limited contributions to the reproductive process.<sup>122</sup> Egg donors in these accounts are at best shadowy figures; their anonymity prevents the emergence of a truly transformative event like the *Baby M.* case around which to galvanize discussion about egg donation.<sup>123</sup> Although egg donors are beginning to assert parental rights in what might be called a nascent jurisprudence of egg donation, the limited amount of case law to date renders any conclusions about the merits of their claims tentative at best.<sup>124</sup> In the media, the dearth of any sustained narratives of the experiences of egg donors inhibits understanding of their work. What cursory treatment exists tends to present egg donors one-dimensionally, either as objectified by determined and not particularly grateful couples and doctors,<sup>125</sup> or as praiseworthy altruists giving the gift of life.<sup>126</sup> The reality of egg donors' motivations may actually be some combination of these characteristics.<sup>127</sup> Egg donors themselves highlight their altruism to diminish any sense that the payment they receive is for remuneration rather than reimbursement.<sup>128</sup> Even stories about advertisements offering \$25,000 to \$50,000 for a college student's egg fail to bring any particular egg donor's experience into the limelight.<sup>129</sup>

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122. See, e.g., *Litowitz v. Litowitz*, 48 P.3d 261, 269 (Wash. 2002) ("[I]t is doubtful that the egg donor would have [any] . . . contractual right once the eggs have been fertilized and become preembryos.").

123. See, e.g., *id.* at 269 (noting that the rights of the egg donor were not being litigated); *Buzzanca v. Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (unknown egg donor); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 481 (App. Div. 1994) (egg donor was anonymous and not a party to the action). For a treatment of how *Baby M.* captured the world's attention, see generally PHYLLIS CHESLER, *SACRED BOND: THE LEGACY OF BABY M.* (1988).

124. See, e.g., *K.M. v. E.G.*, 33 Cal. Rptr. 3d 61, 66–67 (2005) (declaring woman who supplied ova and who intended to raise children born to her lesbian partner with the use of those ova to be the mother of the children); *Rice v. Flynn*, No. 22416, 2005 WL 2140576, at \*9 (Ohio Ct. App. Sept. 7, 2005) (remanding for determination of anonymous egg donor's parental rights).

125. See Gwen Martin, *Selling My Eggs*, GLAMOUR, May 1994, at 168 ("I felt on display, like a piece of furniture or a concubine."). There is some evidence that consumers of in vitro fertilization sometimes worry about the potential for egg donation to be exploitative of women from lower economic strata. See GAY BECKER, *THE ELUSIVE EMBRYO: HOW MEN AND WOMEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES* 153 (2000).

126. See *60 Minutes II: Eggs.com* (CBS television broadcast, June 6, 1999).

127. See *Videotape: The Good Egg* (Fanlight Productions 2003) (presenting egg donors as primarily interested in money but incapable of undergoing the procedure in the absence of a certain degree of altruism).

128. See *id.*

129. See, e.g., Mary Lyndon Shanley, *Collaboration and Commodification in Assisted Procreation: Reflections on an Open Market and Anonymous Donation in Human Sperm and Eggs*, 36 L. & Soc'y REV. 257 (2002).

Feminist emphasis on the inequalities inherent in surrogacy arrangements tends to ossify the dichotomy of gestational function and gametic contribution, with gestation being associated with nurture and gametes with raw materials, body parts, and property.<sup>130</sup> It is relatively easy to situate gamete donation in opposition to gestation. There is no “nurture” aspect to egg donation as there is in gestational surrogacy, no emotional bond that develops in the course of a pregnancy that might give rise to a claim of motherhood.<sup>131</sup> But failing to question the lack of a “mothering instinct” in their decisions may lead to stereotypes of egg donors as mercenary and emotionally barren<sup>132</sup> and the equation of egg donation with sperm donation.<sup>133</sup> The seeming tenacity and irresistibility of the gestational/gametic dichotomy has made it difficult to separate out and emphasize feminist concerns arising from egg donation per se.

Another reason why egg donation is undertheorized is the fact that the technology of egg freezing is still being perfected,<sup>134</sup> making large-scale egg banking something of the future. Although egg banking does exist, it is at present highly controversial because of its potential dangers.<sup>135</sup> Currently, the participation of egg donors in in vitro fertilization requires the intricate synchronization of their ovulatory cycles with the intending mothers’ reproductive cycles.<sup>136</sup> Whatever eggs are retrieved for an in vitro fertilization cycle must be used in that cycle. Whatever embryos retrieved are thought to be sufficiently different from the egg donor’s initial contribution as to vitiate any property-based claim she might bring.<sup>137</sup> In contrast to the surrogate mother’s role, then, the

130. See Katherine R. Guzman, *Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth*, 31 U.C. DAVIS L. REV. 193, 239 (1997).

131. See John A. Robertson, *Legal Uncertainties in Human Egg Donation*, in NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION 175, 177 (Cynthia B. Cohen ed., 1996).

132. See, e.g., Martin, *supra* note 125, at 168 (“[T]he men seemed to disapprove of the fact that ovum donation separated the capacity to reproduce from the ‘drive’ to nurture. In passing along my genetic material without any emotional investment, I was apparently usurping a male reproductive privilege: indifference.”); cf. Rosemarie Tong, *Toward a Feminist Perspective on Gamete Donation and Reception Policies*, in NEW WAYS, *supra* note 131, at 138, 147 (noting the stereotype of sperm donors as “strictly ‘in it for the money’”); but see Y. Englert & I. Govaerts, *Oocyte Donation: Particular Technical and Ethical Aspects*, 13 HUM. REPROD. 90, 93 (1998) (describing study of sperm donors finding “neither financial compensation nor altruism was found to be the main motive for taking the step”).

133. See PATRICIA SPALLONE, *BEYOND CONCEPTION: THE NEW POLITICS OF REPRODUCTION* 99 (1989).

134. See *New Fertility Treatment “Closer,”* BBC NEWS, Sept. 14, 2004, available at <http://news.bbc.co.uk/1/hi/health/3655212.stm>; Tamsin Smith, *Fertility Laws Frustrate Italians*, BBC NEWS, Aug. 8, 2004, available at <http://news.bbc.co.uk/2/hi/europe/3548242.stm>.

135. See Kirsty Horsey, *First Egg Bank to Open in the UK*, BIONEWS, Dec. 2, 2004 (quoting an infertility expert as saying “[t]here is no evidence that egg freezing is safe”), available at <http://www.ivf.net/content/index.php?page=out&id=1100>.

136. See Institute for Reproductive Medicine and Science of Saint Barnabas, available at [http://www.sbfv.com/egg\\_donation\\_donor.htm](http://www.sbfv.com/egg_donation_donor.htm).

137. See, e.g., *Litowitz v. Litowitz*, 48 P.3d 261, 269 (Wash. 2002) (“[I]t is doubtful that the egg donor would have [any]... contractual right once the eggs have been fertilized and become

egg donor's role is limited to a period of time prior to conception. Although it is true that egg donors are currently marketed widely by infertility clinics, with improved egg freezing technology the commodification of egg donors will become even more visible, providing greater impetus for in-depth critical examination of egg donation.

As if in response to the dearth of sustained commentary on egg donation from a feminist perspective, Karen Rothenberg offers a brief outline of the responses the various branches of feminism might make to this technology.<sup>138</sup> She theorizes that given their emphasis on equality and autonomy, liberal feminists would advocate that women be given the choice to donate their eggs, but would insist that the law of egg donation be brought into line with the law of sperm donation.<sup>139</sup> The law should recognize that egg donation is a more complicated procedure than is sperm donation and, where payment for gamete donation is permitted, should allow greater compensation for eggs than for sperm.<sup>140</sup> Liberal feminists would emphasize the need in such arrangements for both informed consent and clear articulations of the intent of the parties.<sup>141</sup> In contrast to liberal feminists, radical feminists, with their emphasis on how men dominate women at all levels of society, would suspect that egg donation is just another way in which men manipulate women's reproductive lives.<sup>142</sup> Moreover, the bargain in egg donation would entrap poor women in need of money and wealthy women caught up in the social construction of infertility in an arrangement that exploits them both.<sup>143</sup> Doctors, lawyers, and brokers would profit from this exploitation.<sup>144</sup> Finally, cultural feminists, who see stark differences between the way men and women approach problems, might see egg donation in a noncommercial setting as an expression of one woman's altruism to another.<sup>145</sup> Such a conception of egg donation would embody feminine values of caring, responsibility, and relationship and would eschew the tendency of men to value autonomy, abstraction and economic activity.<sup>146</sup> This view of egg donation would not support a market in human eggs.<sup>147</sup>

Attempting to locate the common ground among these various

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preembryos.”).

138. See Rothenberg, *supra* note 100, at 75-76.

139. See *id.* at 75; see also Tong, *supra* note 132, at 142.

140. See Rothenberg, *supra* note 100, at 75; see also Tong, *supra* note 132, at 142.

141. See Rothenberg, *supra* note 100, at 75; see also Tong, *supra* note 132, at 145.

142. See Rothenberg, *supra* note 100, at 76.

143. See *id.*; see also Tong, *supra* note 132, at 144.

144. See Rothenberg, *supra* note 100, at 76; see also Tong, *supra* note 132, at 143 (on how Marxist feminism would see egg donation as a forced choice between exploitation and poverty).

145. See Rothenberg, *supra* note 100, at 75; see also Tong, *supra* note 132, at 146.

146. See Rothenberg, *supra* note 100, at 72, 75.

147. See *id.* at 75.

strands of feminism, Rosemarie Tong has crafted a unitary feminist position on egg donation. Her aim is to locate a policy that is “likely to expand the range of women’s genuine procreative choices,” to minimize women’s subjection to the hegemony of capitalism and patriarchy, and to enable women to forge relational connections that serve their best interests.<sup>148</sup> She begins by raising evidence against four totalizing assumptions: (1) “that sperm donors want to remain anonymous”; (2) that sperm donors donate solely for the money; (3) “that egg donors want to know” the recipients of their eggs and vice-versa; and (4) “that even anonymous egg donors are willing to make true donations.”<sup>149</sup> From Tong’s perspective, most, if not all, feminist concerns about egg donation could be addressed through a policy permitting the type of openness in egg donation that could lead to families made up of the egg donor and the recipient individual or couple.<sup>150</sup> In addition, although there should be widespread encouragement for unpaid donation, the policy “should permit, but not require, payment.”<sup>151</sup> To round out her perspective, Tong advocates rigorous medical and psychological screening of and counseling for gamete donors and recipients alike.<sup>152</sup>

I would submit that while egg donation is not quite like sperm donation, it also fails to equate with surrogacy. Although it is true that egg donors tend to be younger and less financially secure than egg purchasers,<sup>153</sup> they do not tend to be of a different race than the purchasers, who as consumers of reproductive technology tend to seek gamete donors who are genetically similar to themselves. For this reason, egg donation seems unlikely to give rise to the “breeder class of poor, minority women” some feminists envision in the context of surrogacy.<sup>154</sup> Nonetheless, issues of class, gender, and age are likely to remain. Even though egg donation is distinct from surrogacy, it should not be uncritically lumped with sperm donation. The rigors of egg donation and the risks of superovulation have been well documented<sup>155</sup> and justify

148. Tong, *supra* note 132, at 148.

149. *See id.* at 147–48.

150. *See id.* at 148.

151. *See id.*

152. *See id.* at 149–52.

153. *See* Nanette Elster, *Ethical Issues for Women Donating Eggs and Embryos*, HUM. RTS. MAG., Summer 2002 (“[W]omen with limited financial resources will be the primary providers of human eggs to enterprises that offer what appear to be lucrative payments.” (quoting Judy Norsigian, executive director of the Boston Women’s Health Book Collective), at <http://www.abanet.org/irr/hr/summer02/elster.html>. *But see* ROBERTSON, *supra* note 98, at 226.

154. ROBERTSON, *supra* note 98, at 227.

155. *See, e.g.*, LAURITZEN, *supra* note 73, at 28; ROBERTSON, *supra* note 98, at 14 (egg donations “entail major intrusions into a woman’s body while the man merely has to provide sperm through masturbation”); SPALLONE, *supra* note 133, at 58–61, 96–98, 164–65; WARNOCK, *supra* note 41, at 8; Marta Kirejczyk, *Enculturation Through Script Selection: Political Discourse and Practice of In Vitro Fertilization in The Netherlands*, in BODIES OF TECHNOLOGY, *supra* note 91, at 183, 194, 202; Shanley,

asking the question whether egg donation, like surrogacy, relies on structures of subordination and dominance that merit further examination. Fertility tourism in particular, in which persons of means may travel to poor countries in search of donor gametes, may magnify these concerns in ways that will be further explored in Part IV.

### III. GLOBALIZATION AND FEMINIST LEGAL THEORY: A FRAMEWORK FOR ANALYSIS

The feminist concerns described above are generally absent from current accounts of globalization. In part, the problem is that much of the popular literature on globalization tends to be enabling and uncritical, celebrating globalization as a creator of global wealth that tempers the violent effects of global inequality.<sup>156</sup> There certainly is abundant criticism of these simplistic, imprecise, and totalizing views of globalization.<sup>157</sup> But even these critical accounts tend to view the problems of globalization mostly in terms of the suppression of local character or in terms of how economic inequality (measured by income inequality "both within and between nations") is actually exacerbated by the blind pursuit of neo-liberalist policies.<sup>158</sup>

Feminist viewpoints generally are understandably absent from both the celebratory and the critical accounts of globalization: the first is gender-blind and blithely untroubled by social problems;<sup>159</sup> the second tends not to explore issues of specific concern to feminists, including the way in which the subjugation of women on a local level finds new vitality in the very forces of globalization said to erase national character.<sup>160</sup> Feminist social scientists concerned about globalization are calling for research that can capture cultural, political, and economic complexity, and expose how globalization reinforces social hierarchies that

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*supra* note 129, at 264.

156. See, e.g., LEGRAIN, *supra* note 3.

157. See *supra* note 13; John Boli et al., *Globalization*, in HANDBOOK, *supra* note 1, at 389, 390.

158. See Salvatore J. Babones & Jonathan H. Turner, *Global Inequality*, in HANDBOOK, *supra* note 1, at 116, 117; see also BURBACH, *supra* note 2, at 14, 54–55, 64 (noting how globalization leads to "further concentration of wealth and income at the top while the wages of those at the bottom drop and the ranks of the unemployed and the impoverished grow"), 85–86, 98 (noting the aggravation of income disparities within the United States), 123; Julia O'Connell Davidson, *Modern-Day Folk Devils and the Problem of Children's Presence in the Global Sex Trade*, in HANDBOOK, *supra* note 1, at 546 [hereinafter Davidson, *Modern-Day Folk*] ("Over the past three decades, 'The poorest 20 percent of the world's people have seen their share of global income decline from 2.3 percent to 1.4 percent. . . . Meanwhile, the share of the richest 20 percent has risen from 70 percent to 85 percent.' This polarization is occurring both between and within nations and has been exacerbated by the pursuit of neoliberal policies for fiscal discipline and economic restructuring.").

159. Cf. Donchin, *Feminist Bioethics*, *supra* note 20 (remarking how "the upper reaches" of the bioethics profession are dominated by men who focus on the problems of advantaged segments of society and pay scant attention to the problems of the poor and other marginalized groups).

160. See *supra* Part I (arguing that globalization perpetuates the dismantling of women's rights on the local level).

disadvantage women.<sup>161</sup> Their proposal is ambitious. It requires a feminist epistemology that is sensitive to and “will work against the erasures of marginalized people and places . . . . [W]e are in sympathy with recent work . . . termed multisited or global ethnography, which is interested in analyzing the connections between and among places; in travel as well as dwelling . . . .”<sup>162</sup> In the words of feminist ethnographer and social geographer Richa Nagar, “[w]e argue for the importance of body, place, and transnational as scales of an alternative, feminist analytic of globalization.”<sup>163</sup> In particular, Nagar advocates paying close attention to interconnections of all sorts, including those between nation-states and international institutions.<sup>164</sup> Similarly grounded, place-based and collaborative inquiry has been advocated in other work on gender.<sup>165</sup>

In an effort to rise to the challenge posed by Nagar and other feminist social scientists and in particular to examine the interconnections between nation-states and international institutions with which manifestations of globalization are punctuated, I want at this point to situate fertility tourism as similar to or distinct from other manifestations of globalization—namely, sex tourism and international adoption. A discussion of the globalist and local dynamics of each of these as well as of the myths deployed to normalize the local dynamic of each will set the stage for Part IV, in which I articulate a feminist response to fertility tourism.

#### A. SEX TOURISM

Sex tourism is a lucrative and growing form of global commerce consisting of cross-border leisure travel accompanied by the purchase of sexual services at the destination.<sup>166</sup> It thrives under the opposing conditions aggravated by global capitalism: concentrations of wealth within industrialized nations and concomitant “disrupt[ions of] established patterns of economic survival in less developed nations.”<sup>167</sup> In the spirit of creating an infrastructure for cultivating new markets, mediating forces such as financial institutions, the tourism industry, Internet brokers, and even law and policy conspire to bring these local conditions together for the generation of wealth.<sup>168</sup> World financial

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161. See Nagar et al., *supra* note 16, at 274.

162. Nagar et al., *supra* note 16, at 278–79.

163. *Id.* at 278.

164. *Id.* at 279.

165. See, e.g., Pease & Pringle, *supra* note 13, at 10 (expressing “the need for a systematic and contextualized but culturally-sensitive investigation of interconnected but also quite idiosyncratic experiences and practices of men within distinct but interrelated gender regimes across the various regions of the world”).

166. See Wonders & Michalowski, *supra* note 13, at 545–46.

167. Davidson, *Modern-Day Folk*, *supra* note 158, at 546.

168. See *id.* at 546–47; see also Donna M. Hughes, *The Internet and the Global Prostitution*



institutions trigger the proliferation of sites for sex tourism by encouraging developing countries to develop their tourist trade.<sup>169</sup> Governments respond through the establishment of legal regimes that encourage the influx of affluent tourists seeking "entertainment"<sup>170</sup> and "cut-rate ecstasy"<sup>171</sup> and assist in facilitating the satisfaction of their desires.<sup>172</sup> Globalization's role in encouraging sex tourism raises concerns about the exploitation of the human body in the global marketplace,<sup>173</sup> but to date the complicity of law and neo-liberalism in creating and maintaining a global sex industry continues to be a matter of apathy in mainstream globalist discourse.<sup>174</sup>

Although it is hardly surprising that bodies become commodities in areas of the world where "reasonably remunerative wage labor associated with commodity production is increasingly difficult to secure,"<sup>175</sup> myths help to undergird the vitality of the sex tourism industry and to deflect attention from the role globalization plays in its proliferation. The myth of unbridled male sexuality is used to explain if not justify the high demand for sex tourism, an industry thought to generate in excess of \$20 billion per year.<sup>176</sup> Myths of racialized and gendered "others" for whom commercial sex is natural and unproblematic help normalize the supply of sex workers:

Sexualised racisms are used by the men to tell themselves that sex is more "natural" and that promiscuity is "a way of life" in the countries they visit, and that the women and children they have sex with are not like the prostitutes back home, but are just "doing what comes naturally" to them.<sup>177</sup>

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*Industry*, in MAKING THE HARM VISIBLE: GLOBAL SEXUAL EXPLOITATION OF WOMEN AND GIRLS; SPEAKING OUT AND PROVIDING SERVICES 64-86 (Donna M. Hughes & Claire M. Roche eds., 1999); Sven-Axel Månsson, *Men's Practices in Prostitution: The Case of Sweden*, in MAN'S WORLD, *supra* note 13, at 139; Nepal: *Debating the Difference Between Trafficking and Prostitution*, RE/PRODUCTIONS, Apr. 1999, <http://www.hsph.harvard.edu/Organizations/healthnet/SAasia/repro2/bol!.htm> (noting how local laws proscribing prostitution and trafficking are not enforced and are applied so as to protect traffickers).

169. See Jacqueline Sánchez Taylor, *Dollars Are a Girl's Best Friend? Female Tourists' Sexual Behaviour in the Caribbean*, 35 SOCIOLOGY 749, 757 (2001) [hereinafter Taylor, *Dollars*].

170. Davidson, *Modern-Day Folk*, *supra* note 158, at 547; see V. SPIKE PETERSON & ANNE SISSON RUNYAN, GLOBAL GENDER ISSUES 138 (2d ed. 1999); PETTMAN, *supra* note 8, at 197-98.

171. PETTMAN, *supra* note 8, at 199 (quoting Lillian Robinson, *The Penile Colony: Touring Thailand's Sex Industry*, 275 NATION 492, 496 (1993)).

172. See Wonders & Michalowski, *supra* note 13, at 562 (describing the Cuban government's facilitation of sex tourism through changes in the law).

173. See PETERSON & RUNYAN, *supra* note 170, at 139 ("[T]he sex industry has become a major pillar of the global economy, erected literally on the bodies of women."); Plummer, *supra* note 1, at 524.

174. See PETTMAN, *supra* note 8, at 200 (citing James Petras & Tienchai Wongchaisuwan, *Free Markets, AIDS and Child Prostitution*, ECON. & POL. WKLY., Mar. 13, 1993, at 442).

175. Wonders & Michalowski, *supra* note 13, at 551.

176. See Davidson, *Modern-Day Folk*, *supra* note 158, at 549; Månsson, *supra* note 168, at 141 (noting the social construction of men's sexual desire as "constantly high and never changing").

177. Taylor, *Dollars*, *supra* note 169, at 759; see also Julia O'Connell Davidson & Jacqueline

Scholars are calling these myths into question in empirical studies that document other motivations for participating in sex tourism. In particular, they note how the subjectivity of sex tourists is not defined primarily or even secondarily by the need to satisfy raging sexual desires and instead tends to be marked by deeply ingrained fantasies about power, privilege, domination and resistance.<sup>178</sup> Specifically, European and American sex tourists express dissatisfaction with dating rituals at home and the whole host of expectations placed upon them before women will capitulate to their sexual demands.<sup>179</sup> Such resentments may have their origin in anxieties over equal rights for women.<sup>180</sup> In addition, sex tourists "can enjoy a level of class privilege available only to wealthier men in their home countries."<sup>181</sup> Sex tourism allows them to resist the societal expectations of their home country and to assert their predominance in a hierarchy of privilege, all in a vacation setting where anonymity, a heightened degree of comfort with risk taking, and indifference to consequences are the norm.<sup>182</sup>

The account of sex workers as naturally drawn to sex work has also been questioned as, at the very least, enabling, and, at worst, blind to global forces that work to cultivate zones of sex tourism. Under the artificially created conditions that result in sex tourism, the compliance of sex workers likely has less to do with any inherent desire to meet the demands of sex tourists and more to do with economic conditions and carefully planned market strategies that make the charade of appearing compliant a monetarily gainful endeavor.<sup>183</sup> Further belying the myth that

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Sánchez Taylor, *Child Prostitution and Sex Tourism: Goa*, 4 ECPAT SERIES RESEARCH REPORTS 29 (1996), available at [http://www.ecpat.net/eng/Ecpat\\_inter/Publication/Other/English/Pdf\\_page/ecpat\\_prostitution\\_and\\_sex\\_tourism\\_goa.pdf](http://www.ecpat.net/eng/Ecpat_inter/Publication/Other/English/Pdf_page/ecpat_prostitution_and_sex_tourism_goa.pdf) ("Westerners' desire for sexual contact with local adults and children is often structured by their racist constructions of the exotic and erotic 'primitive,' while their racist assumptions about cultural 'difference' are used to justify and defend their sexually exploitative acts."); PETERSON & RUNYAN, *supra* note 170, at 138; Jacqueline Sánchez Taylor, *Sex Tourism in the Caribbean*, <http://www.awigp.com/default.asp?numcat=sextour> [hereinafter Taylor, *Sex Tourism*]; Jesús Zúñiga, *Cuba: The Thailand of the Caribbean*, NEW W. INDIAN, Mar. 2001, at 2, 4, <http://www.awigp.com/default.asp?numcat=sextour4> (Castro says Cuban women "just like to make love").

178. See Julia O'Connell Davidson, *The Sex Tourist, the Expatriate, His Ex-Wife and her 'Other': The Politics of Loss, Difference and Desire*, 4 SEXUALITIES 1, 10 (2001) [hereinafter Davidson, *Sex Tourist*] (explaining sexpatriates' rejection of the civilized state in favor of the state of nature).

179. See Taylor, *Sex Tourism*, *supra* note 177.

180. See Davidson, *Sex Tourist*, *supra* note 178, at 19.

181. Wonders & Michalowski, *supra* note 13, at 563.

182. See Davidson, *Modern-Day Folk*, *supra* note 158, at 552; Davidson, *Sex Tourist*, *supra* note 178, at 18; Sharon L. Wallenberg, *ECPAT-USA Testifies Before the U S Senate*, UN REPORTS, Summer 2002, [http://www.usservas.org/un\\_summer\\_2002.htm](http://www.usservas.org/un_summer_2002.htm) ("In the same way that some people go on skiing holidays, or experience local culture through visits to museums or theaters, sex tourists travel to have sex. They go to a place where they are unknown and can behave in a way friends and neighbors back home would find unacceptable.").

183. See Wonders & Michalowski, *supra* note 13, at 551 (remarking how the prostitutes "appear as whatever the tourist needs them to be to achieve the experience he desires"), 563, 564.

sex workers “just want to make love” is evidence showing that, in fact, workers are alienated, disembodied, and exploited<sup>184</sup> and that local citizens (except of course for the workers themselves) are excluded from sex tourism zones.<sup>185</sup>

Being careful to note the differences between male and female sex tourism, Jacqueline Sanchez Taylor has nonetheless documented how women may themselves become aggressors in the context of sex tourism and that it is important to resist interpreting their stories with “essentialist understandings of male and female sexuality.”<sup>186</sup> Like male sex tourists, female sex tourists use travel to heighten and affirm their identity as powerful, attractive, economically privileged and in control of hypersexual, violent and attractive black bodies.<sup>187</sup> They are as one with male sex tourists in undertaking their quests for sex in instrumental, impersonal and sometimes even hostile and predatory ways.<sup>188</sup> Seeing female sex tourism as in some respects synonymous with male sex tourism throws into relief the racist and economic power structures that drive sex tourism<sup>189</sup> and is a reminder that performances of dominance and subordination do not invariably break down along gender lines.<sup>190</sup>

## B. INTERNATIONAL ADOPTION

International adoption, like sex tourism, is facilitated by globalization<sup>191</sup> and is thus open to the criticism that it is neocolonialist and racially and ethnically imperialist.<sup>192</sup> Although the high incidence of international transracial adoption supports its characterization as

184. *Id.* at 551.

185. See Zúñiga, *supra* note 177, at 4 (“When the government began to introduce tourism in the 80’s, it created a world of pleasure that was beyond the reach of the majority. The ‘dollar area’, as it began to be called, reminded many Cubans of the racial and class segregation that kept them out of some clubs and beaches prior to 1959.”).

186. Taylor, *Dollars*, *supra* note 169, at 759.

187. See Taylor, *Sex Tourism*, *supra* note 177.

188. See *id.*; Taylor, *Dollars*, *supra* note 169, at 759; cf. Månsson, *supra* note 168, at 143 (commenting that behind images of prostitutes as kind-hearted comforters lie “sexual scripts [that have] much to do with vengeance and control” (quoting JULIA O’CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* 152 (1998))).

189. See Taylor, *Dollars*, *supra* note 169, at 759.

190. *Id.* at 759–60; PETTMAN, *supra* note 8, at 201.

191. See Jones, *supra* note 4, at 50 (citing Nicole Bartner Graff, Note, *Adoption and the Convention on the Rights of the Child: Can the Free Market in Children Be Controlled?*, 27 SYRACUSE J. INT’L L. & COM. 405 (2000)). On the causes of the demand for international adoption, see generally Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 346 (2004); Crystal J. Gates, *China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 371–72 (1999); Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 693–94 (2003).

192. See Bergquist, *supra* note 191, at 349; Jones, *supra* note 4, at 44; Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights*, 21 B.U. INT’L L.J. 179, 187 (2003).

revolutionary and transformative of the family and of the connections between racial and ethnic communities,<sup>193</sup> whether these transformations are for good or ill remains unclear.<sup>194</sup> Reports of a traffic in babies, the exploitation and coercion of birth mothers, the facilitation of illegal adoptions, and the abuse of adoption law to channel children into sex trades abound in the commentary and reporting critical of international adoption.<sup>195</sup> At the very least, international adoption may deprive children of their national heritage<sup>196</sup> and may deprive sending countries quite literally of their very futures.<sup>197</sup>

Some of the concern about international adoption may lie in a perceived shift in its emphasis from securing the best interests of children to meeting the needs and desires of adults.<sup>198</sup> This shift in emphasis does not line up precisely with studies indicating that for many the drive to become a parent is fueled by the overriding need to have a genetic connection with a child. Under this view, true parenthood is not achievable in the absence of a consanguineous relationship. For this reason, adoption becomes little better than a second or third best alternative,<sup>199</sup> and prospective adoptive parents must mourn the loss of the hoped-for genetic connection before proceeding to adopt.<sup>200</sup> This would suggest, on the one hand, that adoption is not primarily driven by adults' overarching needs and desires—more specifically that it, unlike sex or fertility tourism, is not about satisfying irrepressible, primal urges or allaying desperation. On the other hand, although some infertile couples may resolve their desperate and compulsive quest for fertility and thus distinguish themselves from couples who cling unrelentingly to the promise of assisted reproduction, what remains to them after they have come to terms with their infertility may resemble the frustration and the sense of entitlement of the sex tourist who in the end must, and

193. See Malinda Seymore, *International Adoption & International Comity: When is Adoption 'Repugnant'?*, 10 TEXAS WESLEYAN L. REV. 381, 401 (2004).

194. See *id.*

195. See Davidson, *Modern-Day Folk*, *supra* note 158, at 542, 557 n.1; Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 123–25 (1994); Dillon, *supra* note 192, at 185 n.18 (citing examples); Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 FLETCHER F. WORLD AFF. 155, 163 (2004) (citing Casa Alianza, *United Nations Expert: Majority of International Adoptions in Guatemala Illegal*, LAST MINUTE NEWS, Mar. 31, 2000); Michael Riley, *Deceit Takes Babies Away in Honduras*, BALTIMORE SUN, July 2, 1998, at 2 (reporting on the intimidation and manipulation of birth mothers).

196. See Jones, *supra* note 4, at 44.

197. See RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS* 109 (2000).

198. See Bergquist, *supra* note 191, at 346.

199. See MADELYN FREUNDLICH, *ADOPTION AND ASSISTED REPRODUCTION* 4 (2001); Sandelowski & de Lacey, *supra* note 113, at 40.

200. See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* 66 (1999).

does, settle for second best. Such feelings would be perfectly reasonable responses to societal messages that adoption is a “debased form of parenting”<sup>201</sup> and to domestic adoption agencies that complicate the ability to adopt by mandating open adoption, imposing age caps on prospective adoptive parents, and practicing de facto race matching. The complicated and mercurial nature of prospective adoptive parents’ motivations explains why they are so variously portrayed as selfless rescuers of orphaned and abandoned children, benevolent first-world parents who liberate third-world children,<sup>202</sup> as promoters of social justice,<sup>203</sup> and even as exploiters who, like sex tourists, exoticize and romanticize difference<sup>204</sup> and use their children as “props.”<sup>205</sup>

In contrast to the complexity of motivations held by prospective adoptive parents, there is very little complexity in descriptions of the motivations of birth mothers. The image that predominates is at best of immature and neurotic<sup>206</sup> women and at worst of abused, impoverished and sometimes even enslaved women who are hoodwinked, dominated and ultimately overcome by unscrupulous and money-hungry doctors, lawyers and other baby brokers.<sup>207</sup> The truth likely lies elsewhere, but

201. Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 916 (1994) (quoting ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 168 (1993)).

202. See, e.g., *China's Children: Adoption, Orphanages, and Children with Disabilities: Roundtable before the Congressional-Executive Commission on China*, 107th Cong. 4 (2002), available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107\\_house\\_hearings&docid=f:83513.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_house_hearings&docid=f:83513.pdf) (“In 1994, Nancy and Brooks Robertson adopted their daughter Grace in Shanghai. Like other adoptive parents, they were moved by the plight of the orphan children who remained behind, most of whom have little chance of ever being adopted.”); Bergquist, *supra* note 191, at 344 (“Prospective parents [of Korean adoptees] tended to make their decisions based on religious or moral dictates to save the children from their fate as orphans and to rescue them from the poverty and third-worldness of their country.”); Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 135 (1998). This stereotype probably has little currency today, as we become more willing to admit that adoption, as procreation, tends to be undertaken primarily to satisfy parental interests.

203. See Bergquist, *supra* note 191, at 345. Bergquist theorizes that this stereotype may be a response to collective guilt over centuries of racism and a desire to soothe the national conscience. See *id.* at 347.

204. See *id.* at 346.

205. Dillon, *supra* note 192, at 257 (citing Carol Bellamy, *Kosovo Kids*, WKLY. STANDARD, May 7, 2003, at 6). On the reasons adoptive parents report for pursuing international adoption, see SIMON & ALSTEIN, *supra* note 197, at 88–89. Sharon Elizabeth Rush argues for the principle of “transformative love” to help secure the best interests of internationally adopted children. See Sharon Elizabeth Rush, *Domestic and International Adoptions: Heroes? Villains? or Loving Parents? The Race and Nationality Precepts as Explanations for International Adoptions*, in *MORAL IMPERIALISM: A CRITICAL ANTHOLOGY* 116 (Berta Esperanza Hernandez-Truyol ed., 2002).

206. See Perry, *supra* note 202, at 157 n.223 (describing how the social work literature largely characterizes birth mothers “as neurotic, immature individuals for whom the best solution is invariably to place their child for adoption” (citations omitted)). This stereotype may be losing some of its currency in American domestic adoption, particularly as open adoption becomes the norm and independent adoption begins to lose its appeal.

207. See SIMON & ALSTEIN, *supra* note 197, at 109–15; Mike Allen, *Women Accused of Baby-Selling*

there is a lack of narrative accounts of and empirical research on the experiences of birth mothers, especially those who relinquish their children for international adoption.<sup>208</sup> It is quite easy, then, to construct the birth mother, like the prostitute in the dynamic of sex tourism, in such a way as to justify the pursuit by the adoptive parents for a family of their own. The most palatable way to do this is to construct her not as neurotic or altruistic but as defeated by poverty and forced to relinquish her baby to others. The function of this one-dimensional account of birth mothers' subjectivity ultimately enables our understanding of international adoption as meeting the best interests of children no matter what the motivations of the adoptive parents.

Feminists have urged that greater attention be paid to the relationship between birth mothers and adoptive mothers.<sup>209</sup> Echoing the feminist framework for the study of globalization articulated above, Twila Perry and Nancy Dowd propose that feminists address adoption within "the larger political, economic, and racial context in which adoptions take place."<sup>210</sup> Noting that international adoption invariably involves "the transfer of children from the least advantaged women to the most advantaged,"<sup>211</sup> Perry calls on feminists to theorize the relationship between adoptive mothers and birth mothers beyond "the transfer of the children of the women of poor nations to the women of wealthy nations."<sup>212</sup> She elects to examine international adoption with the aid of existing feminist perspectives on autonomy, choice, and economic disparity.<sup>213</sup> Although Perry acknowledges the need for more birth-mother narratives, she cautions that we must be prepared for the possibility that international adoption is an example of Western women establishing their happiness on the back of third-world women's misery.<sup>214</sup>

At the global level, international adoption distinguishes itself from sex tourism by its lack of facilitation by international financial organizations seeking to develop new markets or by governments seeking entrée into global capitalism. In this context, law and brokers mediate unreliably, as fears of cultural genocide, embarrassment over the exportation of national "resources," and worry about the parenting

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*Used a Friendly Approach*, N.Y. TIMES, May 31, 1999, at B1; Joseph P. Fried, *Long Island Women Plead Guilty in Baby Smuggling*, N.Y. TIMES, July 16, 1999, at B5; David M. Halbfinger, *U.S. Accuses 3 of Smuggling Mexican Babies*, N.Y. TIMES, May 28, 1999, at A1.

208. See Perry, *supra* note 202, at 157.

209. See, e.g., Dowd, *supra* note 201, at 927; Perry, *supra* note 202, at 109–12.

210. See Dowd, *supra* note 201, at 924; Perry, *supra* note 202, at 138, 140, 142.

211. Perry, *supra* note 202, at 102.

212. *Id.* at 162.

213. See Perry, *supra* note 202, at 144–56.

214. See Perry, *supra* note 202, at 144; cf. PETERSON & RUNYAN, *supra* note 170, at 139 ("[T]he sex industry has become a major pillar of the global economy, erected literally on the bodies of women.").

ability of adoptive parents cause governments to suspend their international adoption programs and address these issues. Although, like sex tourism, the demand for international adoption is certainly promoted by channels of communication and travel that are themselves the product of globalization, the global community has responded to the ramifications of this demand by promulgating the Hague Convention on Intercountry Adoption. Among other things, this convention signals international concern about what intercountry adoption could become if left to global market forces and a willingness of some countries to legislate against those possible abuses.

#### IV. GLOBALIZATION AND ASSISTED REPRODUCTION: THE CASE OF FERTILITY TOURISM

As discussed above, fertility tourism is a form of global commerce referring to travel for in vitro fertilization and perhaps leisure at the site of delivery. There is at present little that takes the form of specifically feminist evaluations of fertility tourism. The existing analysis of fertility travel focuses primarily on its causes,<sup>215</sup> the need for rationality and consistency in legislation restricting assisted reproduction,<sup>216</sup> the equalizing force of fertility travel,<sup>217</sup> and, given the inevitability of fertility travel, the need to avoid foreseeable harm.<sup>218</sup> Professor Guido Pennings has written on the importance of pluralism and distributive justice in reproductive technology<sup>219</sup> and believes that governmental tolerance of reproductive tourism is important for maintaining internal peace and stability.<sup>220</sup> He also views reproductive tourism as a leveling mechanism that allows people who cannot afford infertility treatment at home to travel to where it is cheaper.<sup>221</sup> In this way, fertility tourism tends to cure or at least temper the effects of the inequality inherent in a restrictive reproductive regime.<sup>222</sup> Only Professors Blyth and Farrand, albeit obliquely, have raised the possibility that fertility travel may result in harm that national parliaments should acknowledge and address. Their

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215. See, e.g., Blyth & Farrand, *supra* note 33, at 96–99; Mark V. Sauer, *Payments to Gamete Donors. Reproductive Prohibition: Restricting Donor Payment Will Lead to Medical Tourism*, 12 HUM. REPROD. 1844–45 (1997).

216. See, e.g., Robertson, *supra* note 73, at 1693, 1696.

217. See, e.g., Pennings, *Moral Pluralism*, *supra* note 29.

218. See, e.g., Blyth & Farrand, *supra* note 33.

219. See Pennings, *Distributive Justice*, *supra* note 40.

220. See Pennings, *Moral Pluralism*, *supra* note 29.

221. See *id.*; see also Lee, *supra* note 33 (noting the far lower cost of in vitro fertilization abroad). But see Brian Carnell, *Will Fertility Tourism Increase as the UK Adopts New Fertility Treatment Regulations?*, EQUITYFEMINISM.COM, Jan. 25, 2005, <http://www.equityfeminism.com/archives/years/2005/000010.html> (speculating that the cost of fertility travel will exclude “less wealthy women and couples”); “Fertility Tourism” *Fear as Donors Dwindle*, W. MAIL, Dec. 31, 2004, available at <http://icwales.icnetwork.co.uk/> (search article title).

222. See Pennings, *Moral Pluralism*, *supra* note 29.

concerns about the need to prevent foreseeable harm, though, have mainly to do with the fear that fertility tourists may encounter substandard medical practices at the site of delivery or that the child conceived may suffer psychological harm upon discovering she was the product of a commercial transaction.<sup>223</sup> They do not engage the possibility of harm to third-party gamete donors at the site of delivery. What little feminist commentary on fertility tourism exists tends to focus exclusively on infertile women whose rights are curtailed in their own countries.<sup>224</sup> Notably, all of the extant scholarly commentary on fertility travel deals with the clash between infertile individuals and laws that limit their access to reproductive technology. Doctors and governmental bureaucrats have made gratuitous and unsupported comments about the dangers fertility tourists might face at the site of delivery,<sup>225</sup> but at present there is no attention being paid to the potential problems facing third-party egg donors.

In assessing the parallelism of the paradigms described above with the dynamics of fertility tourism, neither of the two emerges as completely congruent with fertility tourism. From a neoliberalist perspective, countries do not pass restrictive reproductive laws for the purpose of becoming participants in the global economy. Indeed, the passage of such laws may often stunt economic growth by prohibiting certain transactions. This is certainly true of Italy, whose recent enactments have effaced its status as a destination for fertility tourists seeking a wide range of assisted reproductive interventions.<sup>226</sup> But this apparent distinction between fertility tourism and sex tourism is largely superficial. It is irrefutable that Italy's laws do generate cross-border demand for infertility services and thus open the way for clinics in other countries to tap an international market that would not otherwise exist.<sup>227</sup> This is also true, only in the reverse, for sex tourism. In that context, it is

223. See Blyth & Farrand, *supra* note 33, at 106–07.

224. See Carnell, *supra* note 221; *Fertility Tourism*, Sept. 22, 2004, <http://www.ifeminists.net/introduction/editorials/2004/0922cynic.html>.

225. See, e.g., Blyth & Farrand, *supra* note 33, at 107 (noting the lack of evidence “about the safety of unregulated procedures in some countries”); Colette Keane, “Fertility Tourism” Fears over EU Move, *IRISH EXAMINER*, July 2, 2004, available at <http://archives.tcm.ie/irishexaminer/2004/07/02/story381622607.asp>; Caroline Ryan, *EU Faces Fertility Tourism Threat*, *BBC NEWS*, June 30, 2004, available at <http://news.bbc.co.uk/2/hi/health/3853237.stm>; *European Enlargement Could Lead to Fertility Tourism from West to East*, *MED. NEWS TODAY*, July 1, 2004, available at <http://www.medicalnewstoday.com/medicalnews.php?newsid=10145>.

226. See Smith, *supra* note 134 (“It is clear that in the collective imagination in Europe, Italy was the place where everything was possible.” (internal quotation marks omitted)).

227. See Smith, *supra* note 134 (“Some clinics in Spain, Austria and Switzerland are already reporting a 20% increase in Italian patients. I spoke to several Italian doctors who intend to set up practices just outside Italy’s borders this autumn.”); *Italian Fertility Treatment Curbed*, *BBC NEWS*, Mar. 9, 2004 (“[A] number of Italian fertility clinics are planning to relocate to neighbouring countries . . .”), available at <http://news.bbc.co.uk/1/hi/world/europe/3545421.stm>.



the law at the *destination* that encourages transactions between sex tourists and local prostitutes.<sup>228</sup> In both the fertility and sex tourism contexts, then, law plays the crucial globalizing role of generating new cross-border market possibilities in the first instance.

Like sex tourism, fertility tourism appears unlikely to inspire the type of concerted response from governments and international bodies that has to a degree allayed humanitarian concerns arising in the context of international adoption. Indeed, the facilitation of fertility tourism by low-cost travel options and communication via the Internet seems perfectly consistent with "[t]he European Union (EU) internal free market guaranteeing the free movement of goods, persons, services and capital to EU citizens . . . ."<sup>229</sup> This "may mean that access to assisted conception services is more likely to be subject to the libertarian principles underlying international trade agreements, under which commercial enterprises will increasingly seek to increase their overall markets, their share of such markets and the range of marketable 'products' . . . ."<sup>230</sup> Thus, the global dynamic of fertility tourism appears in much closer alignment with that of sex tourism than with that of international adoption.

On the local level of supply and demand, fertility tourism has much in common with both sex tourism and international adoption. As noted above, the demand for both sex tourism and international adoption can be explained to a certain degree by resentment toward conditions or policies in the country of origin.<sup>231</sup> Although fertility tourists are distinct from sex tourists in that they are unlikely to play out fantasies of sexualized racism in their quest to conceive a child,<sup>232</sup> resistance to conditions at home also characterizes the motivations of fertility tourists, whether they travel for lower cost in vitro fertilization or to escape restrictions on their reproductive options. If, like infertile Italian couples, their travel is necessitated by restrictive laws, their motivation is very similar to couples who pursue international adoption who, in many cases, are effectively precluded from adopting domestically.<sup>233</sup> In the context of fertility tourism, sex tourism and international adoption, then, tourism occurs because of what has become unavailable at home.

On the supply side of the equation, clinics that cater to fertility tourists appear to welcome the development of new markets and have undertaken to market their services so as to create a fantasy of

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228. See *supra* notes 170–85 and accompanying text.

229. Blyth & Farrand, *supra* note 33, at 97; see *supra* note 21 and accompanying text.

230. Blyth & Farrand, *supra* note 33, at 96.

231. See *supra* notes 179–93, 201 and accompanying text.

232. See *supra* note 177 and accompanying text (on the sexualized racism of sex tourists).

233. See *supra* note 201 and accompanying text.

conceiving a child during a romantic holiday.<sup>234</sup> In response to these new opportunities, like the ready participation of prostitutes in countries that welcome sex tourism,<sup>235</sup> oocyte donation in countries patronized by fertility tourists has surged,<sup>236</sup> as young women in those countries discover that the artificially created market for their eggs offers financial rewards far greater than they can earn from their labor alone.<sup>237</sup> This state of affairs has led experts to assert that “the potential for exploitation of vulnerable women is immense.”<sup>238</sup> Shoring up this fear is the fact that in postcommunist societies like Romania, the economic position of women has deteriorated since the fall of Communism.<sup>239</sup> This does not suggest “that only poor women in need of money will choose to be donors,”<sup>240</sup> but it does suggest that egg donation, like prostitution, will be especially attractive in regions of the world where large numbers of women with few choices want to improve their economic circumstances by any means available. Finally, similar to the way local citizens are excluded from sex tourism zones in their own countries,<sup>241</sup> along with the increased demand for infertility services created by fertility tourists willing to pay high prices arises the possibility, based on fundamental

234. See *supra* note 33 and accompanying text.

235. See *supra* notes 184–95 and accompanying text.

236. See Higgins, *supra* note 40. One Romanian clinic has claimed it has more egg donors than all the fertility clinics in Britain combined. *Romania Becomes the Largest Donator of Human Eggs*, <http://www.femalefirst.co.uk/parenting/292004.htm>.

237. See “Fertility Tourism,” *supra* note 224 (noting that Romanian young women can receive fourteen percent of the average yearly income for one egg donation cycle); Kirsty Horsey, *Romanian Woman Set to Become World’s Oldest Mother*, BioNews, Jan. 11, 2005, available at <http://www.ivf.net/content/index.php?page=out&id=1188&PHPSESSID=28da66857833d25892d412c70d23da71> (reporting on the story and also referencing a BBC report showing that egg donation is on the rise in Romania because donors can make the equivalent of a full monthly salary through donation). But cf. *Romanian “Mail Order Baby” Fears*, BBC NEWS, Feb. 7, 2005, available at <http://news.bbc.co.uk/1/hi/world/europe/4237393.stm> (citing comment of Romanian infertility clinic director that egg donors were paid “around half a month’s salary”).

238. Press Release, Comment on Reproductive Ethics, HFEA Facilitates Trade in Human Eggs, July 11, 2004, <http://www.corethics.org/document.asp?id=cpr110704.txt&se=2&st=4> (quoting the view of Josephine Quintavalle, Director of Comment on Reproductive Ethics); see also Higgins, *supra* note 40 (“It’s such a difficult area of ethics. One [sic] the one hand, people are benefiting from the money. But on the other, we do have this residual concern about exploitation and about inducing women to do something that’s not in their best interests.” (quoting Dr. Stephen Wilkinson, an ethics specialist at Keele University)); “Mail Order Baby,” *supra* note 237, (quoting the secretary of the British Fertility Society who fears young students seeking to supplement their incomes will be “seduced into donating by the offer of money”) (internal quotation marks omitted).

239. See generally Elzbeita Matynia, *Finding a Voice: Women in Postcommunist Central Europe, in THE CHALLENGE OF LOCAL FEMINISMS: WOMEN’S MOVEMENTS IN GLOBAL PERSPECTIVE* 374–85 (Amrita Basu ed., 1995); see also Joanna Regulska, *Transition to a Local Democracy: Do Polish Women Have a Chance?*, in *WOMEN IN THE POLITICS OF POSTCOMMUNIST EASTERN EUROPE* 41, 45 (Marilyn Rueschemeyer ed., 1994); Sharon L. Wolchik, *Women and the Politics of Transition in the Czech and Slovak Republics*, in *WOMEN IN THE POLITICS OF POSTCOMMUNIST EASTERN EUROPE*, *supra*, at 18, 21.

240. See ROBERTSON, *supra* note 98, at 226 (“[I]t is unlikely that only poor women in need of money will choose to be donors.”).

241. See *supra* note 185 and accompanying text.

principles of supply and demand, that segments of the local population will find themselves priced out of the market for reproductive treatment.<sup>242</sup>

Just as in the contexts of sex tourism and international adoption, enabling discourses function in the context of fertility tourism to normalize local dynamics and deflect attention from the oppressive dynamics found there. For example, the myth of unbridled male sexuality used to “explain” if not justify sex tourism<sup>243</sup> is similar to socially constructed accounts of infertility as motivating “desperate” couples to undertake extreme measures in their singleminded quest to have children.<sup>244</sup> Such primal motivations may impel tourists to hazard certain risks and to adopt an attitude of indifference that they would avoid at home.<sup>245</sup> Not surprisingly, no account of such primal motivations exists in the international adoption context, as noted above, since couples adopting transnationally are understood as having abandoned the quest for a biological connection with their child and as having accepted the likelihood that their child will fail even to “pass” as their offspring.<sup>246</sup> Myths about prostitutes in sex tourism zones align with one-dimensional accounts of egg donors’ motivations in countries that are the destinations of fertility tourists. Just as prostitutes in sex tourism zones are constructed not only as sexually liberated but as desirous of making love,<sup>247</sup> egg donors in fertility tourism destinations are portrayed as altogether altruistic.<sup>248</sup> When interviewed, one student who works part-time stated that her motivation to donate eggs had nothing to do with money: “If I can do something to help [infertile couples], why shouldn’t I?”<sup>249</sup>

Although the global and local dynamics of fertility tourism are not in complete alignment with those of either sex tourism or international adoption, on balance, fertility tourism raises more of the same concerns arising from sex tourism and, like sex tourism, appears unlikely to inspire the type of concerted response from governments and international bodies that has to a degree allayed humanitarian concerns arising in the

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242. See ROBERTSON, *supra* note 98, at 14–15, 225–26 (explaining how expensive assisted reproductive services are inevitably distributed according to wealth).

243. See *supra* note 176 and accompanying text.

244. See *supra* note 87 and accompanying text.

245. See Davidson, *Modern-Day Folk*, *supra* note 158, at 547–48.

246. See *supra* note 200 and accompanying text.

247. See *supra* note 180 and accompanying text.

248. See *International Egg Donation Programme*, *supra* note 69 (“All donors available at [the Global ART Centre in Bucharest] are altruistic donors. This means that they are willingly donating their eggs and have no history of infertility.”). Altruism in egg donation has been defined as where “a woman gives up her eggs willingly when she does not undergo fertility treatment herself.” *Ban Imposed on IVF “Egg Giving,”* BBC News, Nov. 29, 2003, available at <http://news.bbc.co.uk/1/hi/health/3248056.stm>.

249. Higgins, *supra* note 40 (quoting Mihaela Simbotin).

context of international adoption. For this reason, feminists are justified in criticizing certain aspects of fertility tourism and in calling on countries considering bans or restrictions on certain forms of reproductive technology to consider and address fully the effects that those laws will have on infertile couples and gamete donors in countries that have become the destinations of fertility tourists.

### CONCLUSION

Outlawing, as Italy has, several familiar and well-established forms of assisted reproduction requiring third-party participation places enormous pressure on infertile couples who yearn to have children. These restrictions, along with high costs and administrative delays in the delivery of infertility treatment, have triggered fertility tourism within the European Union and its candidate countries. This tourism, a manifestation of globalization, has in turn spawned enormous growth of the infertility industry in countries like Slovenia, Hungary, and Romania. Traveling abroad to obtain fertility services unavailable at home creates demand in the host countries that in turn prices some infertile citizens of the host countries out of the market for fertility treatment. At the same time, this fertility tourism generates an artificial demand for gametes that young, single individuals in the host countries have admitted they are only too willing to supply. The fear arising from this state of affairs is that the high fee paid to women in Romania may lead to exploitation of women for their eggs. As such, local laws that purport to outlaw socially irresponsible forms of procreation have extraterritorial effects that violate the spirit of those same laws. By importing oppression in the form of infertile individuals who travel abroad to exercise what they perceive to be their reproductive rights in the destination country in ways that oppress women there, these laws turn public oppression in one country into private oppression in another.

Feminist concerns have to date been largely absent from scholarly discussion of globalization in general and fertility tourism in particular. Coincident with the call of feminist social scientists for a place in the debate over globalization is feminist bioethicists' advocacy for the expansion of feminist analysis across a broader swath of bioethical inquiry. Comparing fertility tourism with sex tourism and international adoption is a way of responding to this call to employ an alternative, feminist analytic that focuses attention on marginalized individuals and explores interconnections between the global and local dynamics of phenomena that implicate the place of women in society. This comparison disturbingly reveals more parallels between fertility tourism and sex tourism, forms of global commerce to which the international community has been largely indifferent, than between fertility tourism and international adoption, concerns about which have received

sustained international attention and response.

World markets are in some respects grotesque. They spring up when mediating agencies such as law, travel and communications strive to satisfy exaggerated, contorted demand with supplies whose human costs are easily hidden in clever packaging. From an economic standpoint, the forces of globalization may be functioning perfectly in the context of fertility tourism, but the value we place on women's reproductive choices should not be measured in terms of who has the greatest ability to pay.